

No. 12056

United States
Court of Appeals

for the Ninth Circuit

GEORGE W. BOULTER and MARGRETTA L.
BOULTER.

Appellants.

VS.

COMMERCIAL STANDARD INSURANCE
COMPANY, a corporation.

Appellee.

Transcript of Record

FILED
DEC 15 1948

Appeal from the United States District Court
for the Northern District of California,
Southern Division

No. 12056

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

NATHAN G. GRAY,

American Trust Building,
Berkeley, California,

Attorney for Plaintiffs and Appellants.

DANA, BLEDSOE and SMITH,

440 Montgomery Street,
San Francisco, California,

Attorneys for Defendant and Appellee.

In the Superior Court of the State of California,
in and for the City and County of
San Francisco

(District Court No. 27857 R—Civil)

No. 371020

GEORGE W. BOULTER and MARGRETTA L.
BOULTER,

Plaintiffs,

vs.

COMMERCIAL STANDARD INSURANCE
COMPANY, a corporation,

Defendant.

COMPLAINT

FIRST CAUSE OF ACTION

Comes now the plaintiff, George W. Boulter, and
complaining of the defendant alleges:

I.

That at all times herein mentioned the defendant, Commercial Standard Insurance Company, was and still is a corporation, duly organized and existing under and by virtue of the laws of the State of Texas, and at all said times duly authorized by the State of California to engage, and engaged, in doing business in this state as a foreign corporation, and duly licensed to write and issue therein public liability and property damage insurance;

II.

That at all times on the 22nd day of June, 1946, and for a long time prior thereto Allen J. Warner and Robert W. Woodrow were copartners engaged

in transporting property for compensation or hire as a business over public highways in the State of California by means of motor vehicles; that at all [1*] said times the said Allen J. Warner and Robert W. Woodrow were authorized by, and had obtained a permit from, the Railroad Commission of the State of California to operate said business;

III.

That at the time that said permit was granted, said Railroad Commission of the State of California required the said Allen J. Warner and Robert W. Woodrow to procure, and continue in effect during the life of said permit, adequate protection in the form of a policy of public liability and property damage insurance, issued by a company licensed to write such insurance in the State of California, against liability imposed by law upon the said Allen J. Warner and Robert W. Woodrow for the payment of damages for personal bodily injuries in the amount of not less than Five Thousand Dollars (\$5,000) on account of bodily injuries to, or death of, one person; and protection against a total liability of the said Allen J. Warner and Robert W. Woodrow on account of bodily injuries to, or death of, more than one person, as a result of any one accident, in the amount of not less than Ten Thousand Dollars (\$10,000); and protection in an amount of not less than Five Thousand Dollars (\$5,000) for one accident resulting in damage or destruction of property, whether the property of one, or more than one, claimant;

* Page numbering appearing at foot of page of original certified Transcript of Record.

IV.

That pursuant thereto and on the 19th day of April, 1946, in the City and County of San Francisco, State of California, the said Allen J. Warner and Robert W. Woodrow procured from the defendant, and the defendant wrote, executed, and delivered to the said Allen J. Warner and Robert W. Woodrow, said policy of insurance; that said policy of insurance contained all the terms and conditions required by the Railroad Commission of the State of California aforesaid described, and pursuant to the provisions of said policy it remained in full force [2] and effect for a period of one year from and after the said 19th day of April, 1946, and provided therein that defendant would pay in behalf of the said Allen J. Warner and Robert W. Woodrow all sums which they may thereafter become obligated to pay by reason of the liability imposed upon them by law for damages, including damages for care and loss of services, because of bodily injuries sustained by any person or persons, or damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance, or use of a certain 1939 Dodge Tractor, motor number T78-1665;

V.

That at all times on said 22nd day of June, 1946, the said Allen J. Warner and Robert W. Woodrow were the owners of and in possession of said Dodge Tractor; that on said day the said Allen J. Warner and Robert W. Woodrow were operating

said Dodge Tractor on Public Highway 101 in the County of Humboldt, State of California, at a point about three (3) miles south of the Town of Scotia therein; that at said time and place said Dodge Tractor collided with an automobile in which the plaintiffs were riding, and that by reason thereof the plaintiff, George W. Boulter, sustained certain bodily injuries and property damage, and the plaintiff, Margretta L. Boulter, certain bodily injuries;

VI.

That thereafter, and on the 8th day of August, 1946, the plaintiffs commenced an action in the Superior Court of the State of California, in and for the City and County of San Francisco, against the said Allen J. Warner and Robert W. Woodrow to recover the damages sustained by said plaintiffs that were caused by said bodily injuries and property damage, and that in said action the said Allen J. Warner and Robert W. [3] Woodrow were represented by attorneys hired by the defendant herein; that thereafter and on the 16th day of September, 1947, a judgment was duly given and made by said court in said action that the plaintiff, George W. Boulter, recover the sum of Three Thousand Dollars (\$3,000), and the plaintiff, Margretta L. Boulter, the sum of Two Thousand Dollars (\$2,000), from the said Allen J. Warner and Robert W. Woodrow, together with their costs of suit taxed in the sum of One Hundred Eighteen and 76/100 Dollars (\$118.76), with interest on said judgment at the rate of seven (7) per cent per annum until paid;

VII.

That on said 16th day of September, 1947, written notice of the entry of said judgment was served upon the attorneys for the said Allen J. Warner and Robert W. Woodrow in said action, and that no notice of motion for new trial has ever been filed in said court pertaining to said action, and that no appeal has ever been taken from said judgment or any part thereof, and that said judgment has ever since been and is still in full force and effect, and is now a final judgment; and that no part thereof has ever been paid, and said judgment is wholly unsatisfied;

Wherefore, this plaintiff prays judgment, etc.

SECOND CAUSE OF ACTION

Comes now the plaintiff, Margretta L. Boulter, and complaining of the defendant alleges:

I.

Plaintiff, Margretta L. Boulter, repeats and re-alleges the allegations contained in paragraphs I, II, III, IV, V, VI, and VII of the first cause of action, and hereby incorporates the same by reference herein and makes it a part hereof, as if the same were herein set forth in full; [4]

Wherefore, plaintiffs pray judgment against defendant as follows:

1. That the plaintiff, George W. Boulter, have and recover of and from the defendant the sum of Three Thousand Dollars (\$3,000), with interest thereon at the rate of seven (7) per cent per annum from and after the 16th day of September, 1947.

2. That the plaintiff, Margretta L. Boulter, have and recover of and from the defendant the sum of Two Thousand Dollars (\$2,000), with interest thereon at the rate of seven (7) per cent per annum from and after the 16th day of September, 1947.

3. That the plaintiffs, and each of them, have and recover of and from the defendant the sum of One Hundred Eighteen and 76/100 Dollars (\$118.76), with interest thereon at the rate of seven (7) per cent per annum from and after the 16th day of September, 1947.

4. That the plaintiffs, and each of them, have and recover of and from the defendant their costs of suit herein, and for such other and further relief as to the court may be meet and proper in the premises.

NATHAN G. GRAY,
Attorney for Plaintiffs. [5]

State of California,
County of Alameda—ss.

Nathan G. Gray, being duly sworn, deposes and says:

That he is the attorney for the plaintiffs in the within entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information or belief, and as to those matters that he believes it to be true; that affiant has his office in the County of

Alameda, State of California, and that plaintiffs are absent therefrom, and by reason thereof affiant makes this verification in behalf of said plaintiffs.

/s/ NATHAN G. GRAY.

Subscribed and sworn to before me this 17th day of November, 1947.

(Seal) FLORENCE RICHMOND,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed Nov. 19, 1947. Martin Monagan, Clerk.

(Preceding this document is the Certificate to Record on Removal to the District Court of the United States. Following it are the Notice of Intention to File Petition and Bond for Removal of Cause to the United States District Court and of Motion for Order for Such Removal. Petition for Removal of Cause to the United States District Court for the Northern District of California, Southern Division. Memorandum of Points and Authorities in Support of Petition for Removal of Cause to District Court of the United States, Bond on Removal and Order for Removal of Cause, and Affidavit of Service by Mail of Notice of Intention to File Petition, etc.)

[Endorsed]: Filed Jan. 16, 1948. C. W. Calbreath, Clerk. [6]

In the District Court of the United States for the
Northern District of California,
Southern Division

No. 27857-R

GEORGE W. BOULTER and MARGRETTA
L. BOULTER,

Plaintiffs,

vs.

COMMERCIAL STANDARD INSURANCE
COMPANY, a corporation,

Defendant.

ANSWER OF DEFENDANT TO COMPLAINT

Defendant, for its answer to the complaint in the
above entitled action, admits, denies and alleges
as follows:

AS TO FIRST ALLEGED CAUSE OF ACTION

I.

Defendant admits each and every allegation contained in paragraph I of the first alleged cause of action of said complaint.

II.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs II, III and V of the first alleged cause of action of said complaint, and placing its denial thereof upon the ground, defendant denies each and every allegation contained in said paragraphs II, III and V. [7]

III.

Defendant denies each and every allegation contained in paragraph IV of the first alleged cause of action of said complaint.

IV.

Defendant admits each and every allegation contained in paragraph VI of the first alleged cause of action of said complaint, except defendant alleges that the representation of Allen J. Warner and Robert W. Woodrow by attorneys hired by the defendant herein was under and pursuant to a reservation of rights agreement executed by the defendants in said State Court action on or about August 26, 1946. A copy of said reservation of rights agreement is attached to this answer and incorporated herein as though set forth at length, being marked Exhibit "A".

Further, in this connection, defendant alleges that on August 27, 1947, the attorneys for this answering defendant presented a motion to the Superior Court of the State of California, in and for the City and County of San Francisco, for leave to withdraw as attorneys for the defendants Warner and Woodrow in the State Court action brought by George W. Boulter and Margretta L. Boulter; that said motion was denied by said State Court.

V.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the following allegations contained in paragraph VII of the first alleged cause of action of said com-

plaint, and placing its denial thereof upon that ground, defendant denies each and every part of the following allegations:

“and that no part thereof has ever been paid, and said judgment is wholly unsatisfied;” [8]

VI.

As and for a further and separate defense, defendant alleges that:

1.

The only insurance policy that this answering defendant has ever written for Allen J. Warner and Robert W. Woodrow is that certain policy numbered M. C. 170330, copy of which is attached hereto, marked Exhibit “B” and by this reference is incorporated herein as though set forth at length, and which said copy it is alleged contains all of the endorsements and all of the terms and provisions of the insurance contract entered into by and between this defendant and the insureds named in said policy.

2.

In declaration No. 5 in said policy it is provided as follows:

“The Automobiles described are and will be used only for transportation of merchandise purposes and will be operated as follows, and this insurance covers for no other use or operation:”

The insured Allen J. Warner, at the time and place mentioned in the complaint in the above entitled action, was engaged in operating that certain

Dodge Tractor referred to in paragraph IV of the first alleged cause of action of said complaint for a purpose other than for the transportation of merchandise, to wit, for the purpose of transporting himself and his family on a vacation trip and for the purpose of carrying himself and his wife home from said vacation trip and at said time and place the said Dodge Tractor was not being used for transportation of merchandise, but was being used in violation of and contrary to the provisions of the above quoted declaration No. 5 in said policy.

3.

That at the time and place of the accident referred to in the complaint herein and at the time of the operation of the Dodge Tractor by Allen J. Warner at the place referred to in paragraph V of the complaint, the said Dodge Tractor was not being operated under the authority of the Highway Carriers' Act of the State of California, Statutes of 1935, Chapter 312, as amended, or the Public Utilities Act of the State of California, Statutes of 1915, Chapter 91, as amended. Further, in this connection, at said time and place of the accident referred to in the complaint herein defendant alleges that said operation of said Dodge Tractor did not arise out of any operations of the insureds under the policy, that was authorized or for which authorization was or is required under the afore-said statutes; and, in this connection, defendant alleges that the said operation at said time and place was for pleasure purposes of the said Allen J. Warner and his wife.

4.

The policy of insurance herein referred to purported to cover only the vehicle described in the policy, to wit, a tractor and trailer, whereas the vehicle involved in the accident referred to in the complaint was a tractor only, for which no insurance was provided under said contract.

5.

Defendant alleges that at the time and place of the accident referred to in the complaint the said Allen J. Warner was driving the Dodge Tractor referred to in the complaint on a pleasure trip, which said trip commenced in San Francisco and was for the purpose of conveying the said Allen J. Warner's mother and son to Willow Creek, California, for the purpose of a visit with his sister at said place; that accompanying [10] said Allen J. Warner on said trip was his wife and as an additional purpose of said trip the said Allen J. Warner was intending to spend a week at Willow Creek on his vacation; that the accident referred to in the complaint happened on the return trip from Willow Creek to San Francisco, at which time the sole purpose of the use of said tractor was to get the said Allen J. Warner and his family back to San Francisco from a vacation trip.

VII.

As and for a further and separate defense, defendant alleges that heretofore on October 18, 1946, defendant filed a complaint for declaratory relief in the District Court of the United States for the Northern District of California, Southern

Division, entitled Commercial Standard Insurance Company, a corporation, Plaintiff, vs. George W. Boulter, Margretta L. Boulter, Allen J. Warner, Robert W. Woodrow, First Doe, Second Doe and Third Doe, Defendants, Numbered therein 26533 G. In said complaint this answering defendant was the plaintiff and the plaintiffs George W. Boulter and Margretta L. Boulter in this action were named as defendants along with the insureds named in the insurance policy referred to in the complaint in this action. In the complaint in the Federal Court action this answering defendant asked for a declaratory judgment against the defendants in said action and for a decree establishing that the Commercial Standard Insurance Company was not obligated to pay any judgment that might be rendered against Allen J. Warner and/or Robert W. Woodrow on account of the accident referred to in the complaint herein. Said complaint in the Federal Court action also asked for a decree that the insurance policy referred to in the above entitled action did not cover the accident of June 22, 1946 between the Dodge Tractor referred to in the complaint on file herein and the [11] automobile of George W. Boulter, and further asking for a decree declaring that the endorsement prescribed by the Railroad Commission of the States of California on said policy of insurance had no application to the accident of June 22, 1946, described in the complaint herein, or to any claims arising therefrom.

That the District Court of the United States for

the Northern District of California, Southern Division, by a judgment duly given and made and duly entered on the 14th day of August, 1947, decreed as follows:

“It appears to the Court and the Court finds that summons and complaint in this cause has been duly and properly served upon the defendant Allan J. Warner and that said Allan J. Warner has failed to appear in this action within the time allowed by law and that said defendant is now in default, said default having heretofore been duly entered at the request of the plaintiff.

The plaintiff having heretofore appeared before this Court on Monday, August 11th, 1947, by its counsel Cooley, Crowley, Gaither and Dana through Leighton M. Bledsoe, of counsel, and having on said date presented its motion for a default judgment, and evidence both oral and documentary having been presented, and the Court being fully advised now finds the allegations of the complaint for declaratory relief are true, and decrees as follows:

It is hereby ordered, adjudged and decreed that plaintiff's motion for a default judgment against defendant Allan J. Warner be, and the same is hereby granted.

It is further ordered, adjudged and decreed as follows:

1. That plaintiff's insurance policy No. MC 170330 does not cover the accident which occurred on June 22, 1946 in Humboldt County, California between the Dodge Tractor driven by Allan J.

Warner and the automobile driven by George W. Boulter.

2. That the named assureds under the plaintiff's insurance policy No. MC 170330 are not entitled to any benefits under or by virtue of said policy of insurance with reference to the said accident of June 22, 1946.

3. That the plaintiff is not obligated to afford any defense to its named insureds under policy No. MC 170330 in any action arising out [12] of the accident described in the complaint filed in the above entitled action.

4. That plaintiff is not obligated to pay any judgment that may be obtained or rendered against the named insureds in policy No. MC 170330 by virtue of any claim or complaint arising out of the accident of June 22, 1946 as described in the complaint.

5. That the endorsement prescribed by the Railroad Commission of the State of California has no application to the accident of June 22, 1946 described in the complaint or to any claims arising therefrom.

Dated: August 14, 1947.

LOUIS E. GOODMAN,
Judge of the District Court of the United States."

That the District Court of the United States for the Northern District of California, Southern Division, by a judgment duly given and made and duly entered on the 27th day October, 1947, decreed as follows:

“It appears to the Court and the Court finds that summons and complaint in this cause has been duly and properly served upon the defendant Robert W. Woodrow and that said Robert W. Woodrow has failed to appear in this action within the time allowed by law and that said defendant is now in default, said default having heretofore been duly entered at the request of the plaintiff.

The plaintiff having heretofore appeared before this Court on Monday, October 27, 1947, by its counsel Cooley, Crowley, Gaither & Dana through Rogers P. Smith, of Counsel, and having on said date presented its motion for a default judgment, and the Court being fully advised now finds the allegations of the complaint for declaratory relief are true and decrees as follows:

It is hereby ordered, adjudged and decreed that plaintiff's motion for a default judgment against defendant Robert W. Woodrow be, and the same is hereby granted.

It is further ordered, adjudged and decreed as follows:

1. That Plaintiff's insurance policy No. MC 170330 does not cover the accident which occurred on June 22, 1946, in Humboldt County, California between the Dodge Tractor driven by Allen J. Warner and the automobile driven by George W. Boulter.

2. That the named assureds under the plaintiff's insurance policy No. MC 170330 are not entitled to

[13] any benefits under or by virtue of said policy of insurance with reference to the said accident of June 22, 1946.

3. That the plaintiff is not obligated to afford any defense to its named insureds under policy No. MC 170330 in any action arising out of the accident described in the complaint filed in the above entitled action.

4. That plaintiff is not obligated to pay any judgment that may be obtained or rendered against the named insureds in policy No. MC 170330 by virtue of any claim or complaint arising out of the accident of June 22, 1946, as described in the complaint.

5. That the endorsement prescribed by the Railroad Commission of the State of California has no application to the accident of June 22, 1946 described in the complaint or to any claims arising therefrom.

Dated: October 27, 1947.

LOUIS E. GOODMAN,
Judge of the District Court of the United States."

That the said Allen J. Warner and Robert W. Woodrow referred to in the foregoing decrees are the same parties referred to in the complaint herein and referred to in the insurance policy mentioned in the complaint herein.

That by reason of the foregoing declaratory judgments the question of this answering defendant's liability under the insurance policy sued on herein has become *res adjudicata*; that said judg-

ments are, and each of them is, a complete and final determination of the issues herein against the plaintiffs in the above entitled action and said decrees operate as a bar to the above entitled action.

During the pendency of the State Court action referred to in the complaint herein as against Allen J. Warner and Robert W. Woodrow, the plaintiffs in said State Court action George W. Boulter and Margretta L. Boulter were represented by their attorney Nathan G. Gray, who is a resident of Alameda County with offices in Berkeley, California; that while said State Court action was pending the above described declaratory relief action was also pending in the District Court of the United [14] States, herein described. On or about October 17, 1946, this answering defendant's attorneys in San Francisco notified attorney Nathan G. Gray by letter of the filing of said declaratory relief action in the Federal Court and of the joinder therein as defendants of George W. Boulter and Margretta L. Boulter. Mr. Gray was also requested by said letter to accept service of summons and complaint in the declaratory relief action on behalf of his clients. On October 19, 1946, these answering attorneys forwarded to said Nathan G. Gray a copy of the complaint for declaratory relief herein referred to; that said attorneys received a letter from attorney Gray, dated October 18, 1946, advising that he would communicate with his clients and request permission to appear in their behalf in the declaratory relief action and again on October 28, 1946 said attorney Gray wrote to the attorneys

for this defendant stating that he would ask the permission of his clients to appear in their behalf and asking for authorities to support the declaratory relief action; that said authorities were supplied to said attorney Gray by letter of November 8, 1946. On December 5, 1946, defendant's attorneys requested by letter to attorney Gray that he file an appearance in the Federal Court on behalf of his clients and stating that if he was not willing to do this to return the copy of the complaint so that it could be used to place in the hands of the United States Marshal for service on Mr. Gray's clients; that said copy of the complaint was never returned by Mr. Gray; that thereafter on January 16, 1947, Mr. Gray requested defendant's attorney to postpone the hearing on the motion of Commercial Standard Insurance Company for an injunction to enjoin the State Court proceedings and this request for a continuance was granted. On February 18, 1947, defendant's attorneys sent a letter to attorney Gray stating that it was understood by them that he had authority to file an appearance for his clients in the [15] declaratory relief action and requesting him to do so; that no denial was ever made of said statement in said letter and no answer was made thereto by the said attorney Gray. On April 29, 1947, defendant's attorneys advised attorney Gray that they intended to proceed against the parties served in the declaratory relief action and to secure a declaratory judgment therein; that during all of the times herein mentioned the said Nathan Gray was acting as the attorneys for plain-

tiffs in the above entitled action and was authorized and empowered to act on their behalf as such attorney with reference to the matters hereinabove referred to; that by reason of the foregoing the plaintiffs herein were advised and had knowledge of the pendency of the declaratory relief action herein referred to and of the issues involved therein; that by reason of the foregoing said plaintiffs are estopped to deny the full force and effect of the declaratory judgments hereinabove described as *res adjudicata* against them, and each of them.

AS TO SECOND ALLEGED CAUSE OF
ACTION

I.

For its answer to paragraph I of the second alleged cause of action of said complaint, defendant hereby repeats and makes a part hereof all of its foregoing admissions, denials, allegations and separate defenses contained in its foregoing answer to the first alleged cause of action of said complaint.

Wherefore, defendant prays that plaintiffs, or either of them, take nothing herein and that defendant have judgment for its costs of suit herein incurred.

/s/ PAUL C. DANA,

/s/ LEIGHTON M. BLEDSOE,

/s/ ROGERS P. SMITH,

/s/ DANA, BLEDSOE & SMITH,

Attorneys for Defendant. [16]

State of California,
City and County of San Francisco—ss.

Leighton M. Bledsoe, being first duly sworn, deposes and says:

That he is a member of the law firm of Dana, Bledsoe & Smith, which law firm has its offices at 440 Montgomery Street, San Francisco, California; that said Dana, Bledsoe & Smith are the attorneys for the defendant; that all of the officers of said defendant are absent from said City and County of San Francisco, where affiant has his and said law firm have their offices, and for that reason affiant makes this verification for and on behalf of defendant; that affiant has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to such matters which are therein stated on his information or belief; and as to such matters he believes the same to be true.

Subscribed and sworn to before me this 19th day of January, 1948.

LEIGHTON M. BLEDSOE,

(Seal) /s/ DOROTHY N. McLENNAN,
Notary Public in and for the City and County of
San Francisco, State of California. [17]

EXHIBIT "A"

San Francisco, California

August 26, 1946

Commercial Standard Insurance Co.

Fort Worth, Texas

c/o Cooley, Crowley, Gaither & Dana,

206 Sansome Street

San Francisco, California

Re: George W. Boulter and Margretta

Boulter v. Allan J. Warner, Robert

W. Woodrow, et al.—

San Francisco Superior Court No. 256235

Comm. Stand. Ins. Pol. No. MC 170330

Gentlemen:

This is to advise you that we, and each of us, agree that you, and any of your representatives and attorneys, may participate in any investigation and/or defense of the above mentioned claim by George W. Boulter and Margretta Boulter, and of that certain action numbered 356235 in the Superior Court of the State of California in and for the City and County of San Francisco brought by said Boulters against us; and that any such action taken or to be taken by you, or any of your representatives, is entirely without prejudice to any rights and defenses of the Commercial Standard Insurance Company under the above described, and any, insurance contract; and any such participation does not and shall not constitute an admis-

sion of liability on the part of said Commercial Standard Insurance Company.

It is likewise understood by us, and each of us, that nothing herein contained shall prejudice the right of either the Commercial Standard Insurance Company or of the undersigned to apply to any court of competent jurisdiction at any time for a determination of the rights of the parties with respect to said, or any, contract of insurance.

We do, and each of us hereby does, waive any right that we, or either of us, may have to claim that the Commercial Standard Insurance Company waives, has waived, or shall waive any right to deny liability under said, and any, contract of insurance. At the same time, we in no way waive any of our rights against the Commercial Standard Insurance Company under said contract.

Very truly yours,

ALLEN J. WARNER,
ROBERT W. WOODROW. [18]

EXHIBIT "B"

AUTOMOBILE LIABILITY POLICY PUBLIC
TRANSPORTATION FORM

M. C. Series 170,001 to 172,000.

Commercial Standard Insurance
Company

Fort Worth, Texas

DECLARATIONS

1. Name of insured: Allen J. Warner and Robert W. Woodrow.

2. Address of insured: No. 10, Ord Court, San Francisco, California.

3. The Insured is: Partnership. Insured's business is: Trucking.

4. The term of this policy begins at 12:01 a.m., April 19, 1946, and ends at 12:01 a.m. April 19, 1947, standard time as to both dates, at the place where this policy is countersigned.

5. The Automobiles described are and will be used only for transportation of merchandise purposes and will be operated as follows, and this insurance covers for no other use or operation:

6. Description of the automobiles or vehicles to which this insurance relates:

Year Model: 1939. Trade Name: Dodge. Type of Body (if trailer—2 or 4 wheel): Tractor. Motor Number, Serial Number: M No. T78-1665, S No. 8702218. Annual B. I. Prem.: \$220.00. Annual P. D. Prem.: \$110.00. Annual Total: \$330.00.

Exhibit "B"—(Continued)

Total Annual Premium: B. I. Prem. \$220.00;
P. D. Prem.: \$110.00. Total: \$330.00.

Railroad Commission Endorsement Attached to
Policy.

349R

REVISED PREMIUM PAYMENT
AGREEMENT

It is hereby understood and agreed that the premium under the policy of which this endorsement is issued to become a part is payable as follows:

Unpaid balance	\$ 66.00
Additional return premium.....	145.53
Balance due	211.53

Balance due shall be payable \$29.10 cash and remainder in 2 equal monthly installments of \$91.21 on or before the 19th day of each succeeding month beginning November, 1946. In case of any change in the premium the unpaid installments shall be adjusted accordingly.

If the Company shall cancel this policy due to failure of the Insured to pay any installment as and when due, such cancellation shall be at the customary short rates.

Subject to all the conditions, limitations and agreements of the policy as written, except as herein specifically provided.

Attached to and forming a part of Policy No. MC 170330 of the Commercial Standard Insurance Company.

Exhibit "B"—(Continued)

If this endorsement is not attached to the Policy at the time the Policy is issued, it is necessary that the Insured sign below.

Accepted:

.....
Insured.

.....
Agent.

Dated at San Francisco, California, this 26th day of November, 1946.

End. 349-R.

305

Name of Insured: Robert W. Woodrow.

In consideration of an additional premium of One Hundred Forty Five and 53/100 Dollars, (\$145.53) it is hereby understood and agreed that the following equipment shall be added to the undermentioned policy on a 300 mile radius:

1-1935 Ward La France Truck M 9521.

2-1932 Pacific Full Trailer S 349.

Ann Prem.

Add. Pro Rate

PL \$220.00

PL \$97.02

PD \$110.00

PD \$48.51

This endorsement shall take effect on the 8th day of November, 1946, 12:01 a.m., and shall terminate with this policy.

Nothing herein contained shall vary, alter, waive or extend any of the terms, warranties, conditions

Exhibit "B"—(Continued)

or agreements of the policy, except as herein specifically provided.

Attached to and forming a part of Policy No. MC 170330 of the Commercial Standard Insurance Company.

Dated at San Francisco, California, this 26th day of November, 1946.

.....
Agent.

Endorsement 305

349

It is hereby understood and agreed that the premium under the policy of which this endorsement is issued to become a part is payable as follows:

Cash on Delivery of Policy: \$68.00.

Handling Charge: \$2.00 Inc.

Balance Due: \$264.00.

Balance due shall be payable in 8 equal monthly installments of \$33.00 on or before the 19th day of each succeeding month beginning May, 1946. In case of any change in the premium the unpaid installments shall be adjusted accordingly.

If the Company shall cancel this policy due to failure of the Insured to pay any installment as and when due, such cancellation shall be at the customary short rates.

Subject to all the conditions, limitations and agreements of the policy as written, except as herein specifically provided.

Exhibit "B"—(Continued)

Attached to and forming a part of Policy No. MC 170330 of the Commercial Standard Insurance Company.

If this endorsement is not attached to the Policy at the time the Policy is issued, it is necessary that the Assured sign below.

Accepted:

.....

Insured.

.....

Agent.

Dated at San Francisco, California, this 19th day of April, 1946.

End. 349

7. The liability of the Company shall be limited to Five Thousand Dollars (\$5,000.00) for one person injured or killed, and, subject to that limit for each person injured or killed, the Company's liability on account of any one accident shall be limited to Ten Thousand Dollars (\$10,000.00). The liability of the Company shall be limited to Five Thousand Dollars (\$5,000.00) on account of claims for damages to or destruction of property in any one accident.

In witness whereof, the Commercial Standard Insurance Company has caused this policy to be signed by its president and secretary at Fort Worth, Texas, and countersigned on the declara-

Exhibit "B"—(Continued)

tions page by a duly authorized representative of the company.

/s/ KARL F. VASIN,
President.

/s/ R. E. BURSON,
Secretary.

Countersigned at This
day of, 19...., by,
Representative.

Commercial Standard Insurance Company
Fort Worth, Texas

(A stock insurance company, herein called
the company)

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I. Coverage A—Bodily Injury Liability

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any per-

Exhibit "B"—(Continued)

son or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile, including the loading and unloading thereof.

Coverage B—Property Damage Liability

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile, including the loading and unloading thereof.

Special Agreements

In consideration of the premium at which this policy is written the following special agreements are made a part of said policy:

(a) The terms of any special endorsement required by law or legal regulation or by any government authority to be attached to this policy shall apply only to accidents occurring within the boundaries of the State or jurisdiction whose laws or authorities require said endorsement.

(b) If one or more copies of this policy are or shall be issued, the liability of the Company under all policies shall not be increased by this fact and the total liability of this Company under all policies combined shall be limited to the amounts shown in each policy.

(c) As between the Insured and the Company the terms of this policy shall govern as though the endorsement or endorsements prescribed and re-

Exhibit "B"—(Continued)

quired under the provisions of the laws or regulations of any State or States or of the United States were not attached; and in consideration of the attachment of said endorsement or endorsements at the request of the Insured, the Insured agrees that if the Company shall be obliged to pay any claim which it would not have been required to pay except for said endorsement or endorsements the Insured named in this policy shall reimburse the Company for any and all sums and disbursements of every kind, including loss payments, costs and expenses, which it shall have paid in connection with such claims, plus expenses incurred by the Company in enforcing the terms of the agreement contained in this Clause C.

II. Defense, Settlement, Supplementary Payments

As respects such insurance as is afforded by the other terms of this policy under coverages A and B the company shall

(a) defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company; (b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability on this policy, all premiums on appeal bonds required in any such defended suit,

Exhibit "B"—(Continued)

but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, and expenses incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident;

(c) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

The company agrees to pay the amounts incurred under this insuring agreement, except settlements of claims and suits, in addition to the applicable limit of liability of this policy.

Bail Bond Expense

The company shall pay the cost of bonds, but without obligation to apply for or furnish such bonds, guaranteeing the insured's appearance in court if such appearance is required by reason of an accident or traffic law violation occurring during the policy period and arising out of the use of an automobile with respect to which use insurance is afforded such insured under coverage A of this policy. The company's liability under this insuring agreement with respect to each bond shall not exceed the usual charges of surety companies for such bond nor \$100.

Exhibit "B"—(Continued)

III. Automobile Defined, Trailers, Two or More Automobiles

Except where specifically stated to the contrary, the word "automobile" wherever used in this policy shall mean the motor vehicle, trailer or semi-trailer described in this policy. The word "trailer" shall include semitrailer.

When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability under coverages A and B.

IV. Temporary Use of Substitute Automobile

While an automobile owned in full or in part by the named insured is withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction, such insurance as is afforded by this policy with respect to such automobile applies with respect to another automobile not so owned while temporarily used as the substitute for such automobile. This insuring agreement does not cover as an insured the owner of the substitute automobile or any employee of such owner.

V. Automatic Insurance for Newly Acquired Automobiles

If the named insured who is the owner of the automobile acquires ownership of another automobile and so notifies the company within thirty days following the date of its delivery to him, such insurance as is afforded by this policy applies also

Exhibit "B"—(Continued)

to such other automobile as of such delivery date:

(a) if it replaces an automobile described in this policy, but only to the extent the insurance is applicable to the replaced automobile, or

(b) if it is an additional automobile and if the company insures all automobiles owned by the named insured at such delivery date, but only to the extent the insurance is applicable to all such previously owned automobiles.

This insuring agreement does not apply: (a) to any loss against which the named insured has other valid and collectible insurance, or (b) except during the policy period, but if such delivery date is prior to the effective date of this policy, the insurance applies as of such effective date.

The named insured shall pay an additional premium required because of the application of the insurance to such other automobile. The insurance terminates upon the replaced automobile on such delivery date.

VI. Policy Period, Territory, Purposes of Use

This policy applies only to accidents which occur during the policy period, while the automobile is within the United States of America, and is owned, maintained and used for the purpose stated as applicable thereto in Statement 5 of the declarations.

EXCLUSIONS

This policy does not apply:

(a) while the automobile is used for transportation of persons for a consideration, unless such use

Exhibit "B"—(Continued)

is specifically declared and described in this policy and premium charged therefor; or while rented, leased or hired;

(b) to liability assumed by the insured under any contract or agreement;

(c) while the automobile is used for the towing of any trailer owned or hired by the named insured and not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile owned or hired by the named insured and not covered by like insurance in the company;

(d) to bodily injury to or death of any employee of the insured while engaged in the employment of the insured, or while engaged in the operation, maintenance or repair of the automobile;

(e) under coverage A, to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;

(f) under coverage B, to injury to or destruction of property owned by, rented to, in charge of or transported by the insured;

(g) while being driven or operated by any persons other than the insured or his paid employee;

(h) to liability for loss or expenses resulting from fire or explosion occurring within the contents of any vehicle (whether such contents be loaded or unloaded) or from leakage of such contents, except contents of the ordinary fuel tank containing fuel for the propulsion of the described automobile only.

Exhibit "B"—(Continued)

CONDITIONS

1. Limits of Liability—Coverage A

The limit of bodily injury liability stated in the declarations as applicable to "one person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to "one accident" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to "one accident" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by two or more persons in any one accident.

2. Limits of Liability

The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability. A disaster or series of accidents arising from one and the same cause, shall be considered one accident within the meaning of this policy.

Exhibit "B"—(Continued)

3. Assault and Battery

Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

4. Notice of Accident

When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

5. Notice of Claim or Suit

If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

6. Assistance and Cooperation of the Insured

The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

7. Action Against Company

Exhibit "B"—(Continued)

No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

8. Other Insurance

If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under Insuring Agreement IV shall be excess insurance over any other valid and collectible insurance available to the insured, either as an

Exhibit "B"—(Continued)

insured under a policy applicable with respect to the automobile or otherwise, against a loss covered under said insuring agreement.

9. Subrogation

In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

10. Changes

Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by a duly authorized representative of the company.

11. Assignment

Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within sixty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) any per-

Exhibit "B"—(Continued)

son having proper temporary custody of the automobile, as an insured, until the appointment and qualification of such legal representative but in no event for a period of more than sixty days after the date of such death or adjudication.

12. Statutory Provisions

If any of the terms or conditions of this policy conflict with the law of the State in which this policy is issued, such conflicting terms or conditions shall be inoperative in such State insofar as they are in conflict with such law. Any specific statutory provision in force in the State in which this policy is issued shall supersede any condition of this policy inconsistent therewith.

13. Cancellation

This policy may be canceled by the named insured by mailing to the company written notice stating when thereafter such cancellation shall be effective. This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancellation stated in the notice shall become the end of the policy period, provided, however, that such date and hour of cancellation shall conform to, and, where different, be reformed to coincide with the date and hour of cancellation effective as to any government authority to which under the terms of this policy or any

Exhibit "B"—(Continued)

endorsement hereto notice is required for cancellation. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

A cancellation of this policy effected through the issuance of notice by the company because of the failure of named insured to pay any premium or to make any report which is required in this policy or any endorsement hereto shall be deemed to be a cancellation at the instance of and by the named insured, provided said notices of cancellation are not issued earlier than ten days after the due date as to said premium or report.

If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be sufficient tender of any refund of premium due to the named insured.

14. Declarations

By acceptance of this policy the named insured agrees that the statements in the Declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

Exhibit "B"—(Continued)

AFFIDAVIT OF COPY

Name of Assured: Allen J. Warner and Robert W. Woodrow.

State of Texas,

County of Tarrant—ss.

On this day before the undersigned authority personally appeared J. S. Pieringer, Jr., who, after being sworn, deposes and states that he is Secretary for the Commercial Standard Insurance Company of Fort Worth, Texas, and that this is a true and correct copy of Policy Number MC 170330 issued for this assured.

/s/ J. S. PIERINGER, JR.

Subscribed and sworn to before me this 15th day of January, A. D. 1948.

(Seal) /s/ KATHLEEN PAYNE,

Notary Public in and for Tarrant County, Texas.

[Endorsed]: Filed Jan. 19, 1948. [24]

[Title of District Court and Cause.]

DEMAND FOR TRIAL BY JURY

Notice is hereby given that the above named plaintiffs do hereby demand a trial by jury of all issues triable by jury in the above entitled cause.

Dated: January 20, 1948.

NATHAN G. GRAY,

Attorney for Plaintiffs.

(Affidavit of Service by Mail.)

[Endorsed]: Filed Jan. 21, 1948. [25]

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS

The plaintiffs above named, pursuant to Rule 36 of the Federal Rules of Civil Procedure, do hereby request that the above named defendant admit the truth of each and all of the following relevant matters of fact:

1. That the policy of insurance referred to in the Answer of Defendant to Complaint as Exhibit "B" had attached to it and effective at all times on the 22nd day of June, 1946, an endorsement entitled, "Standard Form of Endorsement Prescribed by the Railroad Commission of the State of California", numbered 379, a copy of which is attached to the complaint of the plaintiff in that certain action pending in this court in which the defendant herein is the plaintiff and the plaintiffs herein are some of the defendants, numbered 26533 G in the records of the above entitled court.

2. That on the 22nd day of June, 1946, at the time of the accident described in paragraph V of the Complaint on file herein, Allen J. Warner and Robert W. Woodrow were the [26] owners of that certain 1939 Dodge Tractor Motor numbered T78-1665.

3. That on said 22nd day of June, 1946, and at

the time of said accident said 1939 Dodge tractor was being operated by the said Allen J. Warner.

Dated: March 10, 1948.

NATHAN G. GRAY,
Attorney for Plaintiffs.

(Affidavit of Service by Mail.)

[Endorsed]: Filed Mar. 11, 1948. [27]

[Title of District Court and Cause.]

STATEMENT OF DEFENDANT COMMERCIAL STANDARD INSURANCE COMPANY
IN REPLY TO PLAINTIFFS' REQUEST
FOR ADMISSION OF FACTS

Comes now the defendant Commercial Standard Insurance Company and, pursuant to the provisions of Rule 36, Rules of Civil Procedure admits, denies and alleges as follows with respect to the "Request For Admission Of Facts" served upon said defendant on the 11th day of March, 1948:

1. With respect to the demand for admission of facts contained in Paragraph 1 of said request, this defendant admits all of the statements therein contained except that this defendant denies that said "Standard Form of Endorsement Prescribed by the Railroad Commission of the State of California" was effective at any time on the 22nd day of June, 1946, and this defendant alleges and states further that the policy of insurance referred to in the answer filed herein by this defendant, and at-

tached to said [28] answer as Exhibit "B" thereof, was wholly ineffective at all times on the 22nd day of June, 1946, and that said policy and said rider did not attach to, and did not cover said 1939 Dodge tractor at the time and place of the accident referred to in this action.

2. This defendant admits the facts stated in Paragraphs 2 and 3 of said request for admission of facts.

Dated: March 18, 1948.

/s/ PAUL C. DANA,
/s/ LEIGHTON M. BLEDSOE,
/s/ ROGERS P. SMITH,
/s/ DANA, BLEDSOE & SMITH,
Attorneys for Defendant. [29]

State of California,
City and County of San Francisco—ss.

Leighton M. Bledsoe, being first duly sworn, deposes and says:

That he is a member of the law firm of Dana, Bledsoe & Smith, which law firm has its offices at 440 Montgomery Street, San Francisco, California; that affiant and said Dana, Bledsoe & Smith are attorneys for the defendant in this action; that all of the officers of said defendant are absent from said City and County of San Francisco, where affiant and said law firm have their offices, and for that reason affiant makes this verification for and on behalf of the defendant; that affiant has read the foregoing statement and knows the contents

thereof; that the same is true of his own knowledge, except as to such matters which are therein stated on his information or belief; and as to such matters he believes the same to be true.

/s/ LEIGHTON M. BLEDSOE.

Subscribed and sworn to before me this 19th day of March, 1948.

(Seal) /s/ JAMES S. MULVEY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 20, 1948. [30]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiffs and assess the damages against the Defendant in the sum of \$3,000.00 on behalf of the Plaintiff George W. Boulter, and \$2,000.00 on behalf of the Plaintiff Margretta L. Boulter, and on behalf of both in the sum of \$118.76, with interest on all above amounts at the rate of 7% per annum from September 16, 1947.

WM. J. LIEBHARDT,
Foreman.

July 7, 1948.

[Endorsed]: Filed July 7, 1948, at 5:15 p.m. [31]

47a *G. W. Boulter and M. L. Boulter vs.*

In the Southern Division of the United States
District Court for the Northern District
of California

No. 27857-R

GEORGE W. BOULTER and MARGRETTA L.
BOULTER,

Plaintiffs,

vs.

COMMERCIAL STANDARD INSURANCE
COMPANY, a corporation,

Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on July 6, 1948, being a day in the March, 1948 Term of this Court, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Nathan G. Gray, Esq., appearing as attorney for the plaintiffs, and Robert Cathcart, Esq., appearing as attorney for the defendant, and the trial having been proceeded with on the 6th and 7th days of July in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Plaintiffs and assess the damages against the Defendant in the sum

of \$3,000.00 on behalf of the Plaintiff George W. Boulter, and \$2,000.00 on behalf of the Plaintiff Margretta L. Boulter, and on behalf of both in the sum of \$118.76, with interest on all above amounts at the rate of 7% per annum from September 16, 1947. Wm. J. Liebhardt, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiffs do have and recover of and from said defendant the sums set out above, together with their costs herein expended taxed at \$.....

Judgment filed this 8th day of July, 1948.

/s/ C. W. CALBREATH,
Clerk.

Entered in Civil Docket July 9, 1948.

[Endorsed]: Filed July 8, 1948.

[Title of District Court and Cause.]

MOTION OF DEFENDANT FOR JUDGMENT
NOTWITHSTANDING THE VERDICT
AND IN THE ALTERNATIVE
FOR A NEW TRIAL

Comes the defendant, Commercial Standard Insurance Company, a corporation, and files its motion praying that the jury's verdict herein and the judgment rendered and entered thereon be set aside and judgment entered herein for the defendant notwithstanding the verdict, and its motion for a new trial in the alternative, and as grounds therefor states:

A.

The motion for judgment notwithstanding the verdict should be granted for the following reasons:

1. The verdict was contrary to law;
2. The verdict was contrary to the evidence;
3. The verdict was contrary to the law and the evidence; [32]

4. The Court erred in refusing to direct a verdict for the defendant;

5. There was no evidence that, at the time of the accident referred to in the complaint, the tractor described in the policy referred to in the complaint was being used for the transportation of merchandise.

B.

The motion for a new trial in the alternative should be granted for the following reasons:

1. The verdict was contrary to law;

2. The verdict was contrary to the evidence;
3. The verdict was contrary to the law and the evidence;
4. The Court erred in refusing to direct a verdict for the defendant;
5. There was no evidence that, at the time of the accident referred to in the complaint, the tractor described in the policy referred to in the complaint was being used for the transportation of merchandise;
6. The verdict was contrary to the weight of the evidence;
7. The trial Court erred in refusing to give defendant's proposed instruction No. 3;
8. The trial Court erred in refusing to give defendant's proposed instruction No. 5;
9. The trial Court erred in refusing to give defendant's proposed instruction No. 7;
10. The trial Court erred in refusing to give defendant's proposed instruction No. 8;
11. The trial Court erred in refusing to give defendant's proposed instruction No. 9;
12. The trial Court erred in refusing to give defendant's [33] proposed instruction No. 10;
13. The trial Court erred in giving plaintiffs' proposed instruction No. 10;
14. The trial Court erred in giving plaintiffs' proposed instruction No. 11, as modified;

15. The trial Court erred in giving plaintiffs' proposed instruction No. 12, as modified;

16. The trial Court committed error in refusing to set aside the order striking (1) those portions of defendant's answer commencing on page 5, line 10 and ending with the word "them" on page 10, line 17 of said answer, and (2) that portion of said answer beginning on page 10, line 18, entitled "As to Second Alleged Cause of Action" which refers to and incorporates by reference those portions of said answer referred to in clause (1) hereof.

Wherefore, the defendant prays that the verdict of the jury herein, and the judgment rendered and entered thereon, be set aside, and that a judgment be rendered and entered herein in favor of the defendant; and the defendant further prays in the alternative that the Court set aside said verdict and judgment on behalf of the plaintiffs and grant the defendant a new trial herein, and that the Court so condition its order granting such new trial that the same shall become effective only in the event that such judgment notwithstanding the verdict shall be reversed on appeal.

LEIGHTON M. BLEDSOE,
DANA, BLEDSOE & SMITH,
Attorneys for Defendant. [34]

STIPULATION

It is stipulated that the foregoing motions may be heard on Monday, July 12, 1948, at ten o'clock a.m. of said day, before the Hon. L. R. Yankwich,

Judge of said Court, in the courtroom of said Court in which said Judge may be sitting, in the Post Office Building at San Francisco, California.

/s/ NATHAN G. GRAY,

Attorney for Plaintiffs.

/s/ LEIGHTON M. BLEDSOE,

/s/ DANA, BLEDSOE & SMITH,

Attorneys for Defendant.

[Endorsed]: Filed July 12, 1948.

[35]

[Title of District Court and Cause.]

DECISION AND ORDER

Upon the ground stated in the opinion filed herewith, the various motions heretofore argued and submitted are now decided as follows:

I.

The motion of the defendant for a directed verdict, on which ruling has been reserved, is granted.

II.

The verdict and judgment for the plaintiff is set aside and the Clerk of the Court is directed to enter judgment for the defendant that plaintiffs take nothing by their Complaint against the defendant.

III.

The motion for a new trial is denied.

Costs to the defendant.

Dated this 26th day of July, 1948.

LEON R. YANKWICH,

U. S. District Judge.

[Endorsed]: Filed July 26, 1948.

[36]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 26th day of July, in the year of our Lord one thousand nine hundred and forty-eight.

Present: the Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

**MOTION FOR A DIRECTED VERDICT
GRANTED, MOTION FOR A NEW TRIAL
DENIED**

The motion of defendant for a directed verdict upon which ruling was reserved, and the motion of defendant for a new trial heretofore having been submitted for consideration and decision, and consideration having been had, it is Ordered that the motion for a directed verdict be and the same is hereby granted, and that the motion for new trial be and the same is hereby denied, as will appear more fully in an opinion and decision filed this date. [37]

[Title of District Court and Cause.]

OPINION

Appearances: For the Plaintiffs: Nathan G. Gray, Esq., Berkeley, California. For the Defendant: Robert Cathcart, Esq. and Dana, Bledsoe & Smith, San Francisco, California. [38]

Yankwich, District Judge:

I.

THE RESERVED MOTION FOR DIRECTED VERDICT THE DEFENDANT'S ALTERNATIVE MOTIONS

The plaintiffs, by their action, sought to recover from the defendant a total of \$5,118.76, with interest, alleged to be due on a judgment secured by them on September 16, 1947, in the Superior Court of the State of California, in and for the City and County of San Francisco, against Allen J. Warner and Robert W. Woodrow.

Warner and Woodrow were co-partners engaged in the transportation of property for hire, as a business, over public highways in the State of California, by means of motor vehicles. They had been authorized by the Railroad Commission of California to operate such business, and obtained a permit, as required by the law of California. (1) When the permit was issued, Warner and Woodrow were required by the Commission to secure a policy of public liability. The policy was issued by the defendant on April 19, 1946, and was in effect on June 22, 1946, when the accident for which the

recovery had been had in the Superior Court action had occurred. The defendant, having refused to pay the judgment, this action was instituted. A motion for a directed verdict, made by the defendant at the close of the plaintiff's case, was denied. At the conclusion of all the evidence, the defendant again moved for a directed verdict. Action on the motion was reserved. (2) The jury returned a verdict in favor [39] of the plaintiffs. The defendant has moved for a judgment notwithstanding the verdict, or, in the alternative, for a new trial.

II.

THE DECISIVE QUESTION

Under the interpretation which the Supreme Court has placed on Rule 50(b), we are required to rule on both motions. (3) The decision to be arrived at depends on our answer to one question:

Was the accident and the consequent injury to the plaintiffs, for which they recovered, in the Superior Court of the State of California, the judgment sued on here, within the terms of the public liability policy issued by the defendant?

And the answer is conditioned on the meaning of Declaration No. 5 in the policy, which reads:

“The automobiles described are and will be used only for transportation of merchandise purposes and will be operated as follows, and this insurance covers for no other use or operation:”

Compliance with the statutory insurance requirement is a condition precedent to the granting of a

permit by the California Railroad Commission. (4)

Under the Insurance Code of California, the common carrier liability insurance includes insurance against any loss

“from liability of a common carrier for accident or injury fatal or non-fatal to any person.” (5)

And, while such liability includes any loss for which the peril insured against was the proximate cause, it excludes [40]

“any liability for a loss for which the peril insured against was only a remote cause.” (6)

The collision between the truck owned by the defendant and the automobile of the plaintiffs, which resulted in injury to them, occurred in Humboldt County, California, at a distance of three miles from the town of Scotia, Humboldt County, on Public Highway 101. Warner, one of the partners in the trucking business, is our sole source of information as to the circumstance under which he found himself on June 22, 1946, with the truck, without the trailer, at the place where the accident occurred. His story is contradictory. The version he gave on the first day of the trial as to the object of his trip from San Francisco differs from that which he told at the trial in the Superior Court, and at a hearing in this court in an action for declaratory judgment, to which he was made a party, and in which a declaration of non-coverage was secured against him and his co-partner. (7)

In both of those proceedings, he insisted that the trip from San Francisco, where his business is

located, to a small lumber town and resort thirty miles south of Eureka, where his sister resides, was purely a pleasure trip. He took his mother and his wife to see his sister, and to vacation. At the trial here, he claimed that the trip combined both business and pleasure. The business feature of the trip lay in the fact that he carried some 750 feet of pipe and some furniture [41] and stoves for his sister, for which she paid him \$75.00. After his arrival in Humboldt County, he remained nearly a week, during which he assisted in the building of a water line, leaving the work to be finished by more expert mechanics. He returned to San Francisco, a distance of some 250 miles, on June 22, 1946, leaving behind the trailer, which weighs 5 tons, and has a capacity of 15 tons. There was still some pipe on it, and some of the goods which he had brought up. In fact, on his second trip to San Francisco, he took back a large stove which his sister could not use. His wife accompanied him on the return trip. And the sole object of the trip was to pay a premium on the liability policy here involved, which was due June 22, 1946, and which he claims he paid with the cash into which he converted the travelers' checks in the sum of \$75.00, which his sister had paid him for transporting the pipe and the household goods.

After the motion for a directed verdict had been made at the conclusion of all the testimony, Warner was recalled for the purpose of amplifying the version given the day before, and particularly, the

statement that in returning to San Francisco, he also had in mind soliciting trucking business from a contractor residing at San Jose—a Mr. Dowdell. So, on the second day of the trial, he added that he had in mind soliciting from Dowdell and another contractor for whom he had transported materials, but that, as a fact, he did not do so after reaching San Francisco. On the contrary, after paying the premium, he [42] started back for Humboldt County, where he picked up the trailer and returned to San Francisco once more.

We are confronted here with the inherent improbability of a story, which bears almost on the fantastic. Motivation appears in the fact, admitted by Warner on the stand, that he made no mention whatever of the transportation of the pipe when he reported the accident to the highway patrol officer who interviewed him at the scene, or to the agent of the defendant, to whom he gave a full statement of the incident, which was reduced to writing and signed by him. In these statements, made shortly after the accident, the aim of the trip was given as a vacation for his mother, wife, and himself. He claimed that the reason for the omission of the fact that he was carrying the pipe and the household goods was that he thought it unimportant. He admitted, however, that he began to think about the possible significance of the transportation feature of the trip, when, in talking to other truck operators, they reminded him that this transportation might have a bearing upon the liability insur-

ance which he carried. One fact stands out in this narrative: The main purpose of the return trip was made to pay the premium. This main purpose was, in fact, the sole purpose, because we cannot consider any intention not carried into effect, such as solicitation of business.

III.

THE LAW APPLICABLE

It is to be borne in mind that we are interpreting [43] a contract which contains a condition or limitation of liability, regardless of whom has the burden of the proof. (8) Liability does not attach unless the truck, whether alone or with the trailer attached, was actually being used in the transportation of merchandise for hire. And when the facts are not disputed—whether the truck was, at the time of the accident, engaged in the sole activity covered by the policy is a question of law for the court. (9)

In interpreting exceptions or limitations of the type here involved, courts have adopted a latitudinarian rule of construction. And, if it appear that a vehicle covered by the policy, while not strictly used in the acts to which the exception limited it, was being used in the doing of of something which, either under the terms of the policy, or under a broad rule of construction, could be considered “incidental” to the main activity, courts will not hesitate to find liability. Illustrative are the following:

When a policy covered a vehicle operated as a "jitney bus", the fact that, at the time of the accident, it was on a different route than the route to which it was limited by municipal ordinance does not affect liability. (10)

Insurance of an automobile while used in the business of "auto tours" applied to the return trip to a passenger's home, when, by reason of bad weather, the trip to the real estate development was cancelled. (11) [44]

Liability has also been found when there was deviation from the route of a truck (12), where a tractor and trailer were standing empty on the highway after they broke down and their cargo was removed (13), when the vehicle turned into a garage or shop for repair (14), and when a motor bus, after arriving at its terminal, traversed the streets of a city for the purposed of being gassed or parked (15).

Behind all these cases runs the norm that if the vehicle, at the time of the accident, can be said to be on a mission incident to the object to which its use is limited, the courts will give full effect to the policy.

However, if the vehicle is doing something totally unrelated to the use or the physical incident which resulted in the accident is not contemplated by the policy, liability does not exist. Thus, indemnity insurance on vehicles used "incidental to business of funeral director" does not include use of an automobile to transport, for hire, a wedding party. (16)

A "collision" does not include the turning over of the automobile on the edge of a road without striking or colliding with another object other than the ground (17), or the striking of the road with the body of the automobile when the front axle broke. (18)

A policy of insurance indemnifying against risk incident to the hauling of coal with trucks does not cover the use of a truck by one of the insured's employees for pleasure, after working hours. (19)

The reason back of these cases has been stated in this language:

"While it is true that insurance contracts should be construed most strongly against the insurer (*French v. Fidelity & Casualty Co.*, 135 Wis. 259, 115 N.W. 869, 17 L.R.A. (N.S.) 1011; *Kelly v. Fidelity Mut. L. Ins. Co.*, 169 Wis. 274, 172 N.W. 152, 4 A.L.R. 845), yet they are subject to the same rules of construction applied to the language of any other contract. It is a fundamental rule that the language of a contract is to be accorded its popular and usual significance. It is not permissible to impute an unusual meaning to the language of any other contract. The incident causing the damage to the automobile here in question is spoken of in common parlance as an upset or tip-over. If it were the purpose to insure against damage resulting from such an incident, why should not such words, or words of similar import, have been used? We cannot

presume that the parties to the contract intended that an upset should be construed as a collision in the absence of a closer association of the two incidents in popular understanding.” (20) (Emphasis added)

It is evident from a consideration of these cases that the use of a portion of the insured equipment, the truck part, to return to the place of origin, San Francisco, 250 miles away, [46] not for the purpose of picking up a new load, or beginning a new haul, or storing or repairing the truck, but for the purpose of paying a premium on an insurance policy on the truck, is not an act incidental to the transportation of goods on the truck or trailer. Nor, for that matter, is the soliciting of business an incidence of such transportation. To be accessory to the business in which the truck was used, it would have to be covered by a policy which, either did not include any limitation, or insured generally against any act or acts of the defendant while engaged in trucking for hire. But the policy here under consideration was not so comprehensive. The defendant did not insure against all the risks of the plaintiffs while engaged in the business of trucking, but only against a specific risk. Otherwise put, it insured the automobiles when

“used only for transportation of merchandise purposes.” (Emphasis added)

The Railroad Commission rider attached to the policy, which is reproduced in the margin, did not

enlarge on the coverage. (21) Its aim, as I stated at the argument, was to protect the public against certain defenses arising from violations of the law by employees, lack of authorized use and the like, which might defeat liability. It did not, and could not, change a coverage limited to a specific use to a general coverage of the truck, regardless of the use. And, insofar as any of the cases outside of the Ninth Circuit or of California (22), hold to the contrary, they do not require assent. For, aside from the fact [47] that in the face of a conflict of authorities, we may choose those which seem to us the more logical, the case before us, being a diversity case, is controlled by state law. (23)

Rejecting an identical contention as to the effect of an obligatory rider imposed by a Kansas statute, the Circuit Court of Appeals for the Tenth Circuit said:

“Defendants argue that the effect of the rider required by the Corporation Commission was to make plaintiff liable under the policy for damage resulting while the truck was operated for pleasure, notwithstanding that such loss was expressly excluded from coverage.

They construe that part of the rider stating that no violation of any of the provisions of the policy by the insured should relieve the company from liability thereunder to mean that the company would be liable for any damage suffered by the insured, whether resulting

while the truck was being operated in his business of a contract carrier or outside of such business.

“The only power the Corporation Commission has is to adopt rules that will effectuate the statute. It may not adopt any regulation changing the statutory liability. *Dunn v. Jones*, 143 Kan. 218, 53 P. 2d 918. No doubt the Legislature could have required as a prerequisite to the issuance of a permit that the applicant therefor file an indemnity policy protecting the public against all loss resulting [48] from the operation of the truck, whether operated in the business of a contract carrier or for pleasure, or otherwise. * * * The policy did not include coverage for loss from operations other than those of a contract carrier, nor did the permit require such coverage. The damage admittedly was incurred while the insured was operating the truck for pleasure and outside the coverage of the policy. Plaintiff was not liable to respondent in damages for the loss suffered by defendants while the truck was being operated other than in the business of assured a a common carrier.” (24) (Emphasis added)

Cases which seem to declare a contrary ruling are distinguishable on the facts. The courts found, either in the policies themselves, or in the statute under which they were issued, an intention not to limit the use of the vehicle to distinct operations.

This was the situation in *Smith v. California Highway Indem. Exchange*. We quote from the opinion:

“* * * Davis was operating his jitney bus on the ‘29th and Mission’ route, which extended from the ferry at the foot of Maket Street to Valencia Street, thence to Twenty-ninth and Mission. He resided at 311 Jersy Street, which is about five blocks from [49] Twenty-ninth and Mission Streets. On the afternoon of the accident he had returned to his home for the purpose of taking a rest, in preparation for his night run. He parked his car in front of his home, on a grade. After his rest, he entered his car, released the brake and backed down grade to the corner of Noe Street, where he struck the plaintiff.

“* * * It cannot be doubted that the Chandler automobile was ‘maintained’ by Davis for the purpose and business of a jitney bus at the time of the accident. It was operated at the time ‘in the service of the subscriber as a jitney bus . . . within the city and county limits of the city of San Francisco’, and it may not fairly be said that the car was at the time operated for any other purpose than that of a jitney bus. Necessarily Davis was required to keep the car somewhere and it was kept at his home which was the place specified in his operator’s permit where it was to be kept and

which was in the vicinity of the Twenty-ninth and Mission terminus of the route. At the time of the accident, he was operating, using and maintaining his car with the equipment, plates and badge placed and displayed as required by local regulations. The policy did not specify the particular or any route over which the car should be operated. [50] The limits of the operation thereof were the city and county of San Francisco." (Emphasis added)

It is thus evidence that a return trip must be related directly to the business in which the vehicle is to engage, or to the specific act of transportation, if the policy is so limited. And this was the case here. The trip on which the accident occurred was not a use within the terms of the policy.

IV.

CONCLUSION

From what precedes, it follows that the motion for a directed verdict, on which ruling has been reserved, should be granted, the verdict and judgment for the plaintiffs set aside and judgment for the defendant entered. (26)

This conclusion still calls for the disposition of the motion for a new trial. (27)

I realize that this motion could be granted conditioned on its taking effect only if the judgment notwithstanding the verdict is reversed on appeal.

(28)

However, in this case, the motion for a new trial

should be denied. Obviously, if my interpretation of the insurance policy is correct, the jury's verdict is wrong.

If the jury's verdict is right, it can only be because the case presented a factual situation for their solution.

If this be so, then—despite what is said in this opinion about the unsatisfactory character of the testimony [51] concerning the nature of the trip on which the accident occurred—I should allow the jury's conclusion upon the facts to stand and not substitute my own for it. (29)

The motion for a new trial will, therefore, be denied.

Dated this 26th day of July, 1948.

LEON R. YANKWICH,
United States District Judge.

NOTES TO TEXT

1. California Highway Carriers Act, Sections 1, (c) (f), 3; Dearing's General Laws, Act 5129 (a), Secs. 1 (c) (f), 3.

2. Federal Rules of Civil Procedure, Rule 50 (b); See, *Dickerson v. Franklin Nat. Ins. Co.*, 1942, 4 Cir., 130 F (2) 35; *Western Union Telegraph Co. v. Dismang*, 1939, 10 Cir., 106 F (2) 362, 363-364; *Howard v. Swagart*, 1947, U. S. App. D. C., 161 F (2) 651, 655; *Cone v. West Virginia Pulp & Paper Co.*, 1947, 330 U. S. 212; *Fratta v. Grace Line, Inc.*, 1943, 2 Cir., 139 F(2) 743.

3. *Montgomery Ward & Co. v. Duncan*, 1940, 311 U. S. 243.

4. The Highway Carriers Act, Secs. 5, 6 & 7; Deering's General Laws, Act 5129 (a), Secs. 5, 6 & 7.

5. California Insurance Code, Sec. 110.

6. California Insurance Code, Sec. 530.

7. The action for declaratory judgment was instituted by the defendant in this case for the purpose of securing a declaration of non-liability. The plaintiffs here were named parties defendant, summons directed to them was issued, but they were not served. Warner defaulted. After a hearing before the Honorable Louis E. Goodman, one of the Judges of this court, a judgment was entered on August 14, 1947, decreeing that the accident was not covered by the policy. A similar judgment was entered on October 27, 1947, against the co-partner, Robert W. Woodrow, after his default. The defendant in this case pleaded this judgment as res judicata. The portion of the Answer which stated this plea [53] was stricken, on motion, by the Honorable Michael J. Roche, on March 1, 1948. At the trial, the defendant sought to restore this defense, but I declined to do so, agreeing with the view of Judge Roche that the judgment was binding only on the parties who were served with process and appeared or defaulted, and not on the plaintiffs, who, although made parties, were not served, and did not appear. The case cited by the defendant, *Bernhard v. Bank of America*, 1942, 19 C (2) 807, 811-813, does not go counter to these rulings. It recognizes the principle which limits the binding effect of a judgment to parties and their privies.

The plaintiffs here were not represented in that action by the defaulting partners. There was no identity of persons or of cause of action, under such circumstances as result in estoppel by judgment. See, 50 C.J.S., Judgments, Secs. 601, 648, 768; and see, *Tait v. Western Maryland Ry Co.*, 1933, 289 U. S. 620, 623; *Hardy v. Rosenthal*, 1934, 2 C. A. (2) 442, 444-446; *Sasser v. First Joint Stock Land Bank*, 1938, 5 Cir., 99 F (2) 744, 745; *Rheinberger v. Security Life Ins. Co.*, 1945, 7 Cir., 146 F (2) 680, 683.

8. See, *Zohner v. Sierra Nev. L. & Co.*, 1931, 114 C. A. 85, 90; *Cardoza v. West Am. Comm. Ins. Co.*, 1935, 6 C. A. (2) 500, 502; *Ellis v. Order of United Commercial Travelers, etc.*, 1942, 20 C (2) 290, 304.

9. *Universal Automobile Ind. Co. v. Noel*, 1933, 9 Cir., 64 F (2) 916; *Moblad v. Western Indemnity etc. Co.*, 1921, 53 C. A. 683; *Sumida v. Pacific Automobile Ins. Co.*, 1942, 53 [54] C. A. (2) 472.

10. *Smith v. California Highway Indemnity Exchange*, 1933, 218 Cal. 325.

11. *Davis v. California Indemnity Exchange*, 1931, 118 C. A. 403.

12. *Central Mutual Ins. Co. v. Tartar*, 1937, 6 Cir., 92 F (2) 839.

3. *Liberty Mutual Ins. Co. v. McDonough*, 1938, 6 Cir., 97 F (2) 497.

14. *Mitchell v. Great Western State*, 1942, 140 Ohio St. 137, 42 N. E. (2) 771, 141 A. 624.

15. *American Fidelity & C. Co. v. McWilliams*,

1937, 55 Ga. App. 658, 191 S. E. 191; and see, *Johnson Transfer & Freight Lines v. American National Ins. Co.*, 1935, 168 Tenn. 514, 79 S. W. (2) 587; *Selber v. Commonwealth Casualty Co.*, 1930, 106 N. J. L. 611, 150 A. 243.

16. *Heritier v. Central Indemnity Co.*, 1942, 109 N. J. L. 313, 162 A. 573.

17. *Moblad v. Western Indemnity Co.*, 1921, 53 C. A. 683. See also, *Bell v. American Ins. Co.*, 1921, 173 Wis. 533, 181 N. W. 733; *Flythe v. Eastern Caroline Coach Co.*, 1928, 195 N. C. 777, 143 S. E. 865.

18. *Bell v. American Insurance Co.*, *supra*.

19. *Gudbransen v. Peltó*, 1939, 205 Minn. 607, 287 N. W. 116.

20. *Bell v. American Insurance Co.*, *supra*, at p. 734. The language just quoted was adopted by the California District Court of Appeals in *Moblad v. Western Indemnity Co.*, *supra*, a case which, in turn, has the approval of the Circuit Court of Appeals for the Ninth Circuit. See, *New Jersey Ins. Co. [55] v. Young*, 1923, 9 Cir., 290 Fed. 155.

21. "The policy to which this endorsement is attached is an Automobile Bodily Injury Liability and Property Damage Liability policy, and is hereby amended to assure compliance by the insured, as a motor carrier of property, with appropriate provisions of law (Highway Carriers' Act, Statutes 1935, Chapter 223, as amended; City Carriers' Act, Statutes 1935, Chapter 312, as amended; and Public Utilities Act, Statutes 1915, Chapter 91, as amended); and with the pertinent rules, orders,

and regulations of the Railroad Commission of the State of California.

“In consideration of the premium provided for in the policy of which this endorsement is made a part the Company agrees that within the classes of coverage provided by the policy it will pay any final judgment rendered against the insured for bodily injuries to or death of any person or persons other than the named insured, or damage to or destruction of property, or both, arising out of the ownership, maintenance or use of any vehicle operated under authority of the aforesaid statutes, although such vehicle may not be specifically described in the policy; that the judgment creditor may maintain an action in any court of competent jurisdiction to compel such payment; that the right of any person, firm or corporation to recover under the policy shall not be affected by any act, omission, or misrepresentation of the insured or his employees with regard to any warranty, condition, declaration, or provision of the policy; and that the policy shall remain in full force and effect notwithstanding such act, omission or misrepresentation or the violation of any warranty, condition, declaration or provision of the policy by the insured or his employees; Provided, However, that this endorsement shall not be construed [56] to impose any obligation on the Company for which it would not be liable independently hereof with respect to (1) bodily injuries to or death of employees of the named insured arising out of or in the course of their employment, (2) bodily injuries

to or death of any person occurring while such person is riding in or upon or entering or alighting from any vehicle covered by the policy, (3) loss of or damage to property owned by, rented to, in charge of, or transported by the insured, or (4) any loss arising out of any operations of the insured except operations authorized or for which authorization is required under the aforesaid statutes. The insured agrees to reimburse the Company for any payment made by the Company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the Company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement.

“The Company further agrees that such insurance as is afforded by the policy and this endorsement against liability for injuries to or death of persons and damage to or destruction of property shall not be cancelled, rescinded, or suspended, nor shall the cancellation, rescission, or suspension of the policy or of this endorsement take effect, nor shall the policy or this endorsement become void for any reason whatsoever, except by the expiration of the term for which it is written, until the Company shall have first given ten days’ notice in writing to the Railroad Commission of the State of California at its offices, State Building, [57] San Francisco, California. Said ten days’ notice shall commence from the date notice is received at said office of said Commission.

“The Company further agrees that if the policy

shall be cancelled or suspended or otherwise terminated, and shall thereafter be reinstated, notice in writing of such reinstatement shall immediately be given by the Company to said Commission at its said office.

“The Company further agrees that this endorsement shall prevail over any conflicting provision in the policy or in any other endorsement now or hereafter attached thereto or made a part thereof; Provided, However, that this endorsement shall be of no effect with respect to any liability in excess of \$5,000 for bodily injuries to or death of any one person and \$10,000 for bodily injuries to or death of two or more persons in any one accident, and \$5,000 for damage to or destruction of property of one or more than one claimant in any one accident.

“Nothing in this endorsement shall be construed to limit or restrict any coverage otherwise provided by the policy of which this endorsement is made a part.

“When countersigned by an authorized representative of the Company this endorsement becomes a part of Policy No. MC 170330 issued by Commercial Standard Insurance Company (herein called Company) of Fort Worth, Texas, to Allen J. Warner and Robert W. Woodrow, effective April 19, 1946. Countersigned at San Francisco this 19th day of April, 1946.

By E. L. MITCHELL,
Authorized Company Representative.” [58]

22. *Travelers Mutual Casualty Co. v. Thornsbury*, 1936, 276 Ky. 762, 125 S. W. (2) 229; *Rusch v. Mielke*, 1940, 234 Wis. 380, 291 N. W. 300.

23. *Angel v. Bullington*, 1947, 330 U. S. 183, 186-187. See also, *King v. Order of Travelers*, 1948, 333 U. S. 153, 157-158.

24. *Foster v. Commercial Standard Ins. Co.*, 1941, 10 Cir., 121 F (2) 117, 119. And see, *Smith v. Republic Underwriters etc.*, 1940, 152 Kan. 305, 103 P (2) 858, 860; *Hawkeye Casualty Co. v. Halferty*, 1942, 8 Cir., 131 F (2) 294; *Associated Indemnity Co. v. Bunney*, 1942, 9 Cir., 137 F (2) 1, in which our own Circuit Court of Appeals approves *Foster v. Commercial Standard Ins. Co.*, *supra*; *Simon v. American Casualty Co.*, 1944, 4 Cir., 146 F (2) 208; *Stewart v. Hoffmeister*, 1932, 16 Tenn. App. 495, 65 S. W. (2) 220, 224-226. The following statement from *Smith v. Republic Underwriters*, *supra*, at p. 860, sums up the position here taken:

“There is nothing novel in the limitation of coverage contained in the instant endorsement. For instance, provisions are common which limit coverage to specified use of the vehicle. In fact, the instant provision is really one as to use. * * * To disregard this limitation in the policy or to hold it invalid would constitute an attempt to expand the insurer's liability, and if accepted by the insurance carrier, an increase in premiums would inevitably result.” (Emphasis in text.) [59]

25. 218 Cal. 325, 326-327.

26. Federal Rules of Civil Procedure, Rule 50 (b).

27. *Montgomery Ward & Co. v. Duncan*, 1940, 311 U. S. 243.

28. *Western Union Telegraph Co. v. Dismang*, 1939, 10 Cir., 106 F (2) 362; 363-364; *Howard v. Swagart*, 1947, U. S. App. D. C., 161 F (2) 651, 656; *McIlvaine Patent Corporation v. Walgreen Co.*, 1943, 7 Cir., 138 F (2) 177, 179-180;

29. *Aetna Casualty & Surety Co. v. Yeatts*, 1941, 4 Cir., 122 F (2) 350, 352-354; *Murphy v. United States District Court*, 1945, 9 Cir., 122 F (2) 1018, 1020. And see my opinion in *Caldwell v. Southern Pacific Co.*, 1947, D. C. Calif., 71 Fed. Sup. 955, 962-963.

[Endorsed]: Filed July 26, 1948.

[60]

In the District Court of the United States, North-
ern District of California, Southern Division

No. 27,857-R

GEORGE W. BOULTER and
MARGARETTA L. BOULTER,

Plaintiffs,

vs.

COMMERCIAL STANDARD INSURANCE
COMPANY, a corporation,

Defendant.

JUDGMENT

The above-entitled action came on regularly for trial on July 6, 1948 before the Court sitting with a jury, Nathan G. Gray appearing as counsel for the plaintiffs and Dana, Bledsoe & Smith (by Robert Cathcart of counsel) appearing as counsel for the defendant. At the close of all of the evidence, the defendant having moved the Court for a directed verdict in its favor and the Court having reserved its ruling on said motion, the jury returned a verdict in favor of plaintiffs and against defendant in the total amount of Five Thousand One Hundred Eighteen Dollars and Seventy-six Cents (\$5,118.76), with interest thereon; judgment having been entered on said verdict on July 9, 1948, and the defendant having thereafter renewed its motion for a directed verdict and having, in addition, moved the Court for Judgment in its

favor notwithstanding the verdict and, in the [61] alternative, for a new trial, and said motions having been taken under advisement, and the Court having on July 26, 1948, filed herein its Decision and Order (supported by the Court's written opinion) granting defendant's motion for a directed verdict and granting defendant's motion for judgment in its favor notwithstanding the verdict, and ordering said verdict and judgment for the plaintiffs set aside, and directing the Clerk of the Court to enter Judgment for the defendant that plaintiffs take nothing by their Complaint against the defendant, and denying defendant's motion for a new trial in the alternative.

It Is, Therefore, Ordered, Adjudged and Decreed that defendant's motion for a directed verdict be, and the same is hereby, granted; that defendant's motion for judgment in its favor notwithstanding the verdict be, and the same is hereby, granted; that the verdict for the plaintiffs and judgment thereon heretofore entered be, and the same are hereby, set aside;

It Is Further Ordered, Adjudged and Decreed that plaintiffs take nothing by their Complaint against defendant, that the Complaint be dismissed on the merits, and that defendant recover from plaintiffs its costs, in the amount of \$....., as taxed, and that defendant have execution thereon.

It Is Further Ordered, Adjudged and Decreed that the Clerk insert in this Judgment the amount

of the costs, as taxed, and that the Clerk enter this Judgment of record.

Dated this 5th day of August, 1948.

LEON R. YANKWICH,
Judge of the United States District Court.

[Endorsed]: Vol. 5, Page 84. Filed Aug. 5, 1948.

Entered in Civil Docket Aug. 6, 1948. [62]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

Notice Is Hereby Given that the plaintiffs above named, George W. Boulter and Margretta L. Boulter, do, and each does, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from:

1. That certain decision and order made by and filed in the record of this court on the 26th day of July, 1948, granting the motion of the defendant for directed verdict on which ruling had been reserved, and setting aside the verdict and judgment for the plaintiffs and ordering the clerk of this court to enter judgment for the defendant that plaintiffs take nothing by their complaint against the defendant; and

2. From the final judgment entered of record in the office of the clerk of the above entitled court on the 6th day of August, 1948, in favor of the

defendant above named, and against the plaintiffs above named. [63]

Said appeal is taken from the whole and each and every part of said decision and order, and from the whole and every part of said final judgment.

/s/ NATHAN G. GRAY,
Attorney for Appellants, George W. Boulter and
Margretta L. Boulter.

[Endorsed]: Filed Aug. 18, 1948.

[64]

[Title of District Court and Cause.]

DESIGNATION OF THE PORTIONS OF THE
RECORD, PROCEEDINGS, AND EVIDENCE
TO BE CONTAINED IN THE RECORD
ON APPEAL

Notice Is Hereby Given that the plaintiffs and appellants, George W. Boulter and Margretta L. Boulter, do hereby designate the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this cause:

1. Complaint.
2. Answer of Defendant to Complaint.
3. Demand for Trial by Jury.
4. Request for Admission of Facts.
5. Statement of Defendant Commercial Standard Insurance Company in Reply to Plaintiffs' Request for Admission of Facts.
6. All evidence received during the trial, includ-

ing the testimony of all witnesses, all stipulations or admissions of counsel, all writings and other exhibits received in evidence, all motions and applications made during the trial and the rulings thereon. [65]

7. The verdict of the Jury and Judgment entered thereon.

8. Motion of Defendant for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial.

9. Minute order granting motion of defendant for judgment notwithstanding the verdict.

10. Decision and Order filed on July 26, 1948.

11. Opinion of the trial court.

12. Judgment entered pursuant to said decision and order.

13. Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

14. Designation of the Portions of the Record, Proceedings, and Evidence to be Contained in the Record on Appeal.

15. All other records required by the provisions of Rule 75, Subdivision (g), of the Federal Rules of Civil Procedure.

/s/ NATHAN G. GRAY,

Attorney for Appellants, George W. Boulter and
Margretta L. Boulter.

(Affidavit of Service by Mail.)

[Endorsed]: Filed Aug. 18, 1948.

[66]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
THE PLAINTIFFS AND APPELLANTS
INTEND TO RELY ON THE APPEAL IN
THIS CAUSE

1. The allegations of the complaint were all proven without conflict or admitted by the pleadings or stipulation.

2. The plaintiffs established a prima facie case entitling them to recover as prayed for in their complaint.

3. The court committed error in granting the motion of the defendant for a directed verdict in that plaintiffs established a prima facie case and the granting of said motion was based on the testimony of Allen J. Warner, a witness called by defendant.

4. The testimony of the witness, Allen J. Warner, was discredited, and the jury had a right to disregard all or any part of his testimony.

5. The court usurped the function of the jury in directing a verdict for the defendant and entering judgment in favor of defendant notwithstanding the verdict of the jury in favor of the plaintiffs.

6. The evidence was sufficient to sustain the verdict of the jury in favor of the plaintiffs.

/s/ NATHAN G. GRAY,
Attorney for Appellants, George W. Boulter and
Margretta L. Boulter.

(Affidavit of Service by Mail.)

[Endorsed]: Filed Aug. 23, 1948.

[68]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL

Good cause appearing therefor, It Is Hereby Ordered that the time for filing and docketing the record on appeal in the above entitled cause be, and the same is hereby, extended to and including the 15th day of October, 1948.

Dated September 17th, 1948.

MICHAEL J. ROCHE,
Judge of said U. S. District Court.

[Endorsed]: Filed Sept. 17, 1948. [69]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing 69 pages, numbered 1 to 69, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of George W. Boulter and Margretta L. Boulter, Plaintiffs, vs. Commercial Standard Insurance Company, a corporation, Defendant, No. 27857-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$9.40 and that the said amount

has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 5th day of October, A. D. 1948.

(Seal)

C. W. CALBREATH,
Clerk.

[70]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Tuesday, July 6, 1948

Appearances: For the Plaintiffs: Nathan G. Gray, Esq. For the Defendant: Robert Cathcart, Esq.

(A jury was duly impanelled and sworn to try the case.)

(Mr. Nathan G. Gray then made an opening statement to the jury.) [1*]

NOEL COLEMAN,

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Will you state your name to the Court and the jury? A. Noel Coleman.

Direct Examination

By Mr. Gray:

Mr. Gray: Q. Mr. Coleman, will you state your business or office?

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

(Testimony of Noel Coleman.)

A. Yes, sir, I am assistant secretary of the California Public Utilities Commission.

Q. And how long have you had that position?

A. Since February, 1946.

Q. Now the Public Utilities Commission was formerly the Railroad Commission, was it?

A. That's correct.

Q. And when was the name changed from the Railroad Commission to the Public Utilities Commission?

A. It was changed by Constitutional amendment on November 1, 1946. [2]

Q. So when we refer to "Railroad Commission" in the past, or "Public Utilities Commission" now, we are referring to one and the same thing, is that right?

A. That's correct.

Q. All right. Now Mr. Coleman, you have the records of permits issued under the Highway Carriers Act, you have some of the records with you?

A. Yes, sir, I have.

Q. And do you have any record of an application for a permit and a permit that was issued to Allan J. Warner and Robert W. Woodrow?

A. Yes, sir, I have.

Q. And would you state with reference to June, 1946, when was the last time prior to that date that they applied for a permit under the Highway Carriers Act?

A. They were given a Highway Common Carrier permit numbered 38-3486 under date of June 28, 1945.

(Testimony of Noel Coleman.)

Q. And that permit remained in effect how long? A. Until December 1, 1946.

Q. And as far as your records are concerned, it was in full force and effect on June 22, 1946, was that right? A. That's correct.

Q. Now as a condition for granting this permit, does your Commission require that Warner and Woodrow obtain a policy of insurance? [3]

A. Yes, sir.

Q. And was such a policy of insurance obtained? A. Yes, sir.

Q. And you have in your files a certificate certifying that such was issued?

A. Yes, sir. It is covered by policy number MC170330, effective from April 19, 1946, to April 19, 1947.

Q. And that policy to which you just referred—

Mr. Gray: Counsel, will you stipulate that is the policy here involved?

Mr. Catheart: I am sure it is, if you say it is, Mr. Gray.

Mr. Gray: I believe it is.

The Court: Very well.

Mr. Gray: Q. Is it permissible for you to remove any of those documents? A. No, sir, it is not.

Q. You have to keep it intact?

A. I have to keep them intact, yes, sir.

The Court: Now what is it you are taking out of this?

Mr. Gray: I think it probably has it in the certificate, your Honor—

(Testimony of Noel Coleman.)

The Court: I think you can read the substance of it into the record. Is any issue made, gentlemen, about these preliminary steps under the policy?

Mr. Cathcart: No, as far as I know, your Honor. [4]

Mr. Gray: In other words, counsel, do you stipulate that at the time of this action and for a time prior thereto and subsequent thereto, the policy that we have referred to in the complaint was in full force and effect, subject to whatever the terms of the policy are?

Mr. Cathcart: Well the policy was in full force and effect subject to its terms. I do not stipulate that at the time of this action it was in effect. That is why we are here.

Mr. Gray: I am not asking you to stipulate on the coverage.

The Court: No, you are not stipulating coverage, but that the coverage, according to the terms to be shown, was in effect.

Mr. Cathcart: Surely.

Mr. Gray: Well, putting it another way, counsel, in your other action for declaratory relief, you attached a copy of the policy.

Mr. Cathcart: Yes.

Mr. Gray: To that action, to your complaint.

Mr. Cathcart: Yes.

Mr. Gray: Will you stipulate that that complaint had attached to it a true copy of the policy here involved? Or do you have the original policy?

(Testimony of Noel Coleman.)

Mr. Cathcart: We have already covered all this in your [5] demand and our answer, and we have admitted that to be the fact.

Mr. Gray: Well, do you have the original policy here?

The Court: Well, a copy, gentlemen, is attached here.

Mr. Gray: Well that policy that the defendant attached in his action, your Honor, I don't believe the defendant did it intentionally, but the insurance company neglected to attach the endorsement that we feel is very important.

The Court: I see.

Mr. Gray: I am sure they didn't do it intentionally.

Mr. Cathcart: I just referred to it by reference; it was a Railroad Commission write-up. Here is the original policy in this other action. I wonder if we could have it removed from the other action file.

The Court: Well, we won't remove it, but we can take it by reference as an exhibit.

Mr. Cathcart: Surely.

Mr. Gray: All right, then, counsel has handed me the file in action number 26544-G, Civil, in this Court, entitled Commercial Standard Insurance Company, a Corporation, vs. George W. Boulter and Margretta L. Boulter, Allan J. Warner, Robert Woodrow, and certain fictitious parties. And is it stipulated, counsel, that in this file is the original policy and is the document right here?

(Testimony of Noel Coleman.)

Mr. Cathcart: Yes, that is my understanding, Mr. Gray. [6]

Mr. Gray: And that is that.

Mr. Cathcart: This is the Railroad Commission rider, right here.

Mr. Gray: All right. And it is stipulated that subject to the terms of the policy, whatever they are, it was in full force and effect at all times on June 22, 1946?

Mr. Cathcart: Subject to the terms of the policy.

Mr. Gray: Subject to the terms of the policy, it was in full force and effect?

Mr. Cathcart: Well it was issued before that date and it was in effect at a date subsequent to that date. Now I don't want you to think I am quibbling about whether it was in full force and effect, but the policy was outstanding. It is just that it is still a question.

The Court: Well gentlemen, you are talking about different things. You were talking coverage.

Mr. Cathcart: That's right.

The Court: And he is talking about the existence of the policy.

Mr. Cathcart: That's correct, your Honor.

Mr. Gray: You accept my stipulation?

Mr. Cathcart: Surely.

The Court: All right.

Mr. Gray: Then if the Court please, may this policy to which I have just referred, and this is a policy— [7]

The Court: Let me ask you—. Just a moment, I want to ask the Clerk about some customs.

(Testimony of Noel Coleman.)

(A conversation was had between the Clerk and the Court out of the hearing of the Reporter.)

The Court: All right, go ahead. I always like to consult the local Clerk as to the customs, whether they could be removed. In our district they don't allow removal, so we take it by reference. The Clerk will mark it by reference, and then of course you can read any portion of it that you desire to the jury at the proper time.

Mr. Gray: Certainly.

The Court: All right.

Mr. Gray: Then at this time, your Honor, the plaintiffs offer in evidence a policy of insurance on the stationery of Commercial Standard Insurance Company, bearing the number MC170330, which purports to have been issued on April 19, 1946, and to expire on April 19, 1947. I will ask that this policy be admitted.

The Court: It may be so marked and received by reference.

Mr. Gray: Thank you.

The Clerk: Plaintiff's Exhibit No. 1.

(Insurance Policy No. 170330, Commercial Standard Insurance Company, referred to above, was received in evidence as Plaintiff's Exhibit No. 1, by reference.)

[Printer's Note: Plaintiff's Exhibit No. 1 is printed out in full as Exhibit "B," page 25 of

(Testimony of Noel Coleman)

this printed record, with following added rider attached to Plaintiff's Exhibit No. 1:]

(Supersedes all endorsements heretofore required by said Commission)

The policy to which this endorsement is attached is an Automobile Bodily Injury Liability and Property Damage Liability policy, and is hereby amended to assure compliance by the insured, as a motor carrier of property, with appropriate provisions of law (Highway Carriers' Act, Statutes 1935, Chapter 223, as amended; City Carrier's Act, Statutes 1935, Chapter 312, as amended; and Public Utilities Act, Statutes 1915, Chapter 91, amended); and with the pertinent rules, orders, and regulations of the Railroad Commission of the State of California.

In consideration of the premium provided for in the Policy of which this endorsement is made a part the Company agrees that within the classes of coverage provided by the policy it will pay any final judgment rendered against the insured for bodily injuries to or death of any person or persons other than the named insured, or damage to or destruction of property, or both, arising out of the ownership, maintenance or use of any vehicle operated under authority of the aforesaid statutes, although such vehicle may not be specifically described in the policy; that the judgment creditor may maintain an action in any court of competent jurisdiction to compel such payment; that the right

(Testimony of Noel Coleman)

of any person, firm or corporation to recover under the policy shall not be affected by any act, omission, or misrepresentation of the insured or his employees with regard to any warranty, condition, declaration, or provision of the policy; and that the policy shall remain in full force and effect notwithstanding such act, omission or misrepresentation or the violation of any warranty, condition, declaration or provision of the policy by the insured or his employees; Provided, However, that this endorsement shall not be construed to impose any obligation on the Company for which it would not be liable independently hereof with respect to (1) bodily injuries to or death of employees of the named insured arising out of or in the course of their employment, (2) bodily injuries to or death of any person occurring while such person is riding in or upon or entering or alighting from any vehicle covered by the policy, (3) loss of or damage to property owned by, rented to, in charge of, or transported by the insured, or (4) any loss arising out of any operations of the insured except operations authorized or for which authorization is required under the aforesaid statutes. The insured agrees to reimburse the Company for any payment made by the Company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the Company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement.

(Testimony of Noel Coleman)

The Company further agrees that such insurance as is afforded by the policy and this endorsement against liability for injuries to or death of persons and damage to or destruction of property shall not be cancelled, rescinded, or suspended, nor shall the cancellation, rescission, or suspension of the policy or of this endorsement take effect, nor shall the policy or this endorsement become void for any reason whatsoever, except by the expiration of the term for which it is written, until the Company shall have first given ten days' notice in writing to the Railroad Commission of the State of California at its office, State Building, San Francisco, California. Said ten days' notice shall commence from the date notice is received at said office of said Commission.

The Company further agrees that if the policy shall be cancelled or suspended or otherwise terminated, and shall thereafter be reinstated, notice in writing of such reinstatement shall immediately be given by the Company to said Commission at its said office.

The Company further agrees that this endorsement shall prevail over any conflicting provision in the policy or in any other endorsement now or hereafter attached thereto or made a part thereof; Provided, However, that this endorsement shall be of no effect with respect to any liability in excess of \$5,000 for bodily injuries to or death of any one person and \$10,000 for bodily injuries to or death

(Testimony of Noel Coleman)

of two or more persons in any one accident, and \$5,000 for damage to or destruction of property of one or more than one claimant in any one accident.

Nothing in this endorsement shall be construed to limit or restrict any coverage otherwise provided by the policy of which this endorsement is made a part.

When countersigned by an authorized representative of the Company this endorsement becomes a part of Policy No. MC 170330 issued by Commercial Standard Insurance Company (herein called Company) of Fort Worth, Texas, to Allen J. Warner and Robert W. Woodrow, effective April 19, 1946, 12:01 a.m., standard time at the address of the insured as stated in said policy.

Countersigned at San Francisco this 19th day of April, 1946.

By /s/ E. L. MITCHELL,
Authorized Company Representative.

The Court: In due time, ladies and gentlemen, the counsel [8] will read the portions they desire to be read in order to have any records transcribed that are prepared in this case.

Mr. Gray: Q. Well, Mr. Coleman, from your standpoint, from the standpoint of your Commission, then, the permit was issued in reliance of this policy, of which you had a certificate in your files, is that correct?

(Testimony of Noel Coleman.)

A. We had a certificate in our files.

Q. And on June 22, 1946, at all times on that day as far as your records are concerned, Warner and Woodrow had a permit to engage in the business of transporting merchandise for hire, is that correct?

A. As far as our records are concerned, yes sir.

Mr. Gray: Thank you. That is all.

The Court: Any questions, Mr. Cathcart?

Cross-Examination

By Mr. Cathcart:

Mr. Cathcart: Q. Mr. Coleman, your records of course do not show the activities of Warner and Woodrow from day to day, as they operated their business? A. No, sir, they do not.

Q. So that when you speak of this policy being in effect, you mean that your records do not show that there were any existing defenses to it or that the people named therein were engaged in something other than transportation of merchandise?

A. Not that we know of.

Mr. Cathcart: Yes. Thank you.

The Court: All right.

The Witness: May I be excused?

The Court: The witness is excused.

(Witness excused.)

The Court: All right, call your next witness.

Mr. Gray: Now if the Court please, we have entered into a stipulation to the effect that I may state in open Court, and this will be regarded as evidence in this case,—

The Court: Yes.

Mr. Gray: —that the judgment that Mr. and Mrs. Boulter obtained in a State court has never been paid. No part of that judgment has ever been paid, and the whole of it is now due, owing and unpaid.

The Court: And the amount is \$3,000 for Mr.—?

Mr. Gray: Well, the amount is alleged in the complaint. I will give it to your Honor. As to George W. Boulter, the amount is \$3,000 with interest at 7% from and after the 16th of September, 1947, which we have not computed. To the plaintiff Margretta L. Boulter, it is the sum of \$2,000 with interest of 7% from the 16th of September, 1947, and for both defendants, is the sum of \$118.76, costs incurred.

The Court: I see. All right. That is the unpaid portion of the judgment. [10]

* * * *

Mr. Gray: The plaintiff rests, your Honor.

The Court: All right. [11]

* * * *

Afternoon Session, Tuesday, July 6, 1948

2:00 o'clock p.m.

The Court: All right, let the record show that the following proceedings are had outside the presence of the jury.

I was informed that you had a motion to make, and rather than bring in the jury and then excuse them, I thought I would give you greater freedom by having them remain out until the motion is concluded.

Mr. Cathcart: Thank you, your Honor. At this time the defendant moves for a dismissal of this action under the provisions of rule 41-b; on the ground that the plaintiff, after completing the presentation of his evidence, has not shown any right to relief.

Now our position is substantially this: The plaintiff has put in evidence an insurance policy which on its face provides that the automobile described is and will be used, only for transportation of merchandise purposes, and will be operated as follows—and this insurance covers for no other use or operation.

Now it is our position that, although certain special defenses may place on us the burden of at least going ahead on the defense, on the fundamental proposition of whether or not there is coverage to this particular incident, we submit [13] that the burden is on the plaintiff. Now if I were suing on a fire policy and all I showed was that my house had been destroyed, I think that I would have to show that it had been destroyed by fire. Similarly, in any action between the assured, and of course the third party who has recovered the judgment here is in no better position than the assured—it would be up to the assured to show that it falls perfectly within the four corners of the policy; not

as to the conditions subsequent, not as to the failure to give notice, special defenses of that kind. I concede that if this were that type of a defense on the policy, the burden of showing one of those special defenses would be ours. But to bring us into Court, I submit that in this case it was up to the plaintiffs to prove that at the time of the accident the defendant, or rather the assured, was engaged in the transportation of merchandise. I submit on that point. [14]

* * * *

The Court: I may say, gentlemen, that since we adjourned, I have studied the cases that you called to my attention, and the question in each case, and I gather from the cases I read, is as to whether the condition that is alleged was violated is a condition precedent to recovery or not. I think, Mr. Cathcart, the case that you cite, the Ellis case, the mutual benefit case, is the typical double indemnity clause, which states that a person can recover if the death occurs by accidental means.

* * * *

So I feel that in this case a prima facie case has been shown when they produce a judgment of the Court in addition to the other facts, which shows a recovery against them for injury caused by their truck and the conditions of liability are general and imposed by statute; the limitation becomes an exception, which it is duty of the defendants to prove.

Now I don't want to deprive you of the right to make any further comments; I just wanted to tell

you my reaction on the case you cited and the other cases, and why, in my opinion, regardless of the fact that there are now all sorts of limitations, which have been placed by our Circuit Court of Appeals on the right to direct a verdict and also to dismiss a matter upon a motion at the close of the plaintiff's testimony—

Mr. Cathcart: Well, we must submit the motion without any further argument, your Honor.

The Court: Very well. What do you call your motion, a motion to dismiss or a motion for a directed verdict?

Mr. Cathcart: A motion to dismiss.

The Court: All right, the motion will be denied.

Mr. Cathcart: Well, at this time—

The Court: You have some instructions? [19]

Mr. Cathcart: At this time we request a directed verdict.

The Court: A directed verdict?

Mr. Cathcart: I should like to move for a directed verdict at the conclusion of the evidence, which will be put in this afternoon.

The Court: Well you have a right to move under the rules both times, either at the conclusion of the plaintiff's case or at the conclusion of both.

Mr. Cathcart: Yes.

The Court: And as we have to inform you of the actions on instructions before the argument—which is the rule now which obtains on both the civil and criminal cases, you will have ample opportunity to do so. I usually excuse the jury, so that you will have ample opportunity, when the evi-

dence is concluded and before the argument to make such motion in addition to the form of instructions which you have submitted.

Mr. Cathcart: Surely. Now there are a couple of other points that I would like to take up at this time very briefly in order to protect ourselves on the record here.

In this case we pleaded *res adjudicata*, alleging in our answer that the fact of non-coverage had been determined in an action for declaratory relief brought by the insurance company, the defendant in this action, against the assured, Warner and his partner, and also against the Boulters, the [20] plaintiffs in this action. We were unable to effect this service on the Boulters. We obtained a judgment on a hearing. It was a default judgment. It was made on a hearing before Judge Goodman, and now Judge Roche ordered that defense stricken on the ground that it was not *res judicata*, for the reason presumably that the Boulters were not a party to that action. We had argued that since the action of the plaintiffs was derivative, their rights were no larger than those of the assured, and that a judgment against the assured would bar the plaintiffs in this action.

So at this time again, just to protect our record, I ask that the order striking the second ground of defense, specifically, paragraphs 6 and 7—I beg your pardon, paragraph 7 of our answer, be vacated and set aside and on it being granted, I offer to prove the granting of the declaratory judgment by Judge Goodman, in which it was declared that the

insurance policy which is the subject matter of the present action did not cover the accident involved in this case.

The Court: All right.

Mr. Cathcart: And I submit that motion. Well, I say that I submit the motion—I am making, of course, an offer of proof to prove the existence of a judgment. [21]

* * * *

The Court: The motion will be denied.

Mr. Cathcart: And there is one other point I would like to bring up at this time, your Honor. Since we now have the duty of going ahead with the proof, it is obvious that the assured, Warner, is the man whose evidence will be necessary [24] to us. Now I suggest that we should be permitted to examine him as an adverse witness. Of course if we are to be bound by everything he says, he will probably say that he is insured, which is a very normal reaction. Accordingly, I submit that we should be permitted to examine him as an adverse witness, and not be bound.

The Court: I don't see how you can, under Section 43-c. I haven't the rules before me.

Mr. Cathcart: It says that if he is hostile or adverse, he may be led.

The Court: Well, he isn't proved to be adverse. You have to prove that he is hostile. You have to show by regular rules. You can't call him under Section 43-b because he is not an adverse party. And to interrogate an unwilling or hostile witness, you must first show that he is hostile. If you know

in advance that he is going to be hostile, you can't call him.

* * * *

[25]

The Court: I cannot determine that in advance, you will have to call him, and then after you call him, if you lay a foundation in a proper manner, why then I will rule upon the [27] question.

* * * *

ALLAN J. WARNER,

called on behalf of the defendant, sworn.

The Clerk: Will you state your name?

A. Allan J. Warner.

Direct Examination

By Mr. Cathcart:

Q. Mr. Warner, in what place do you live?

A. I live at Number 10 Ord Court.

Q. And how long have you lived there?

A. 27 years.

Q. I see. And are you in business of some kind?

A. I was.

Q. At the present time, or not?

A. No, I am not.

Q. I see. And there has been reference here to an accident that involved a certain piece of equipment—that was brought up. I will ask you if on June 22, 1946, you were in business.

A. Yes, sir, I was.

Q. And were you by yourself or were you with someone? A. I was in partnership.

Q. And what was your partner's name?

A. Robert W. Woodrow.

(Testimony of Allan J. Warner.)

Q. And at that time did you engage—well, what kind of business was it?

A. Transportation of property for hire.

Q. I see. And what kind of equipment did you have?

A. I had a 1939 Dodge with a 1938 trailer, a tractor and trailer.

Q. I beg your pardon?

A. Tractor and trailer.

Q. A tractor-trailer combination?

A. That's right.

Q. Now just what is that tractor? Just try to describe it. What sort of an instrument is it?

A. Well, a tractor is a truck without a body on it. It has got a fifth wheel on it.

Q. What is that fifth wheel? [29]

A. The fifth wheel supports the weight of the trailer. In other words, well, it is a tractor-trailer combination, that's all.

Q. I see. Well, now, describe briefly the trailer.

A. The trailer was a 1937 or 1938—I don't remember now— Stake trailed. It was a 24 foot trailer, I believe.

Q. The trailer was 24 feet long?

A. I believe so.

Q. You say a stake trailer, you mean it had stakes up on the sides? A. That's right.

Q. Now going back to the tractor again, what is it used for, what is the use made of a tractor?

A. The tractor pulls the trailer.

(Testimony of Allan J. Warner.)

Q. The tractor pulls the trailer; and does that tractor have any kind of a body on it?

A. It has got a plate, well, this particular one.

Q. It has? That is the one I am talking about.

A. Well, we are talking about this particular one. This particular one had a pair of saddle tanks on it. Across the saddle strappings was a plate.

Q. What is that plate made of? A. Steel.

Q. I see. Now what is the purpose of that plate?

A. Well that plate is, as a general rule, for carrying axles [30] and lines, and cables, chain, gear.

Q. Gear for use in connection with the truck, is that it? A. Yes, more or less.

Q. I see. And now is there any kind of cab on this truck, or this tractor?

A. Yes, it has got a conventional cab on it.

Q. I see. And how many places are there in the cab? A. How many—what do you mean?

Q. Well I mean, can two people sit there?

A. Yes, two people could sit there—three could sit there.

Q. I see. And at this particular time, where was your place of business?

A. I operated out of Number 10 Ord Court, my home.

Q. That is in San Francisco, is it?

A. Yes, sir.

Q. I see. And where were your operations generally, in the six months before that time? Was there any definite route you would follow?

(Testimony of Allan J. Warner.)

A. No, no definite route. I wildecatted.

Q. I see. Well where did you go while you wildecatted?

A. Well I used to run to San Jose regularly and Sacramento, I used to go as far as Stockton, all around this locality.

Q. I see. And have you told us now about most of the places you used to go to while you were wildecatting?

A. Yes, as far as I can remember. [31]

Q. What does "wildecatting" mean?

A. Well, a wildecat is one that has no definite over-the-road operation of his own, so he sub-hauls for big contractors.

Q. I see. Did you follow the practice of sub-hauling for these contractors? A. I did.

Q. Who were some of those big contractors in particular? A. One of them was—

Mr. Gray: Just a moment, I object on the ground that it is incompetent, irrelevant, and immaterial.

The Court: Yes, I will sustain the objection.

Mr. Cathcart: Q. And now do you recall having been involved in an accident with any of the equipment on June 22, 1946?

A. You mean this particular piece of equipment?

Q. Yes. A. Yes, I do.

Q. Well now you say this particular piece of equipment; what particular piece of equipment do you mean?

(Testimony of Allan J. Warner.)

A. The 1939 tractor, the Dodge tractor.

Q. The Dodge tractor? A. Yes.

Q. And where was that accident?

A. I think it was about two miles south of Scotia.

Mr. Cathcart: Now just to get some of these points a little clearer, with your Honor's permission and Mr. Gray's [32] permission, I am going to ask to have introduced in evidence a Shell road map just so that this gentleman can refer to it and we can tell where this thing happened.

Mr. Gray: Well if your Honor please, I don't quite understand the purpose of it. The accident is not being tried. I think as long as we agree there was an accident and that we got the judgment, that is all that matters. I don't quite see the materiality. Maybe I am missing something.

The Court: Well, I think the place where the accident occurred is material in view of the defense that is raised.

Mr. Gray: All right.

The Court: All right.

Mr. Cathcart: I am not advertising for the Shell Oil Company, but this is useful as a map; may I show it to the witness?

The Court: All right. What county is this in? The town of Scotia—what county is that in?

Mr. Cathcart: Scotia is a few miles south of Eureka.

The Court: Is it Humboldt County?

Mr. Cathcart: It is Humboldt County, yes sir.

(Testimony of Allan J. Warner.)

The Court: All right.

Mr. Catheart: Q. Now is that the Scotia you have reference to? (Indicating) A. Uh-huh.

Q. I see. Now at the time that that accident happened, in which [33] direction were you going?

A. I was coming South.

Q. And where was the trailer at that time?

A. The trailer was in Eureka, or to be exact, Blue Lakes.

Q. Well now, Blue Lakes — which particular Blue Lake was that?

A. Well that is what they call the south fork of Willow Creek.

Q. Is that near Eureka?

A. Yes, it is 34 miles this side of Eureka.

Q. It is not this Blue Lakes up here in Lake County, I take it? A. No.

Q. And is that Blue Lake between the scene of the accident and Eureka, just so that the jury can have it in their minds as to where this thing happened? A. No, not exactly.

Q. Well where was it with reference to Eureka, are they both south of Eureka?

A. Southeast of Eureka.

Q. I see. Now at the time that this accident happened, were you alone?

A. No sir, I wasn't.

Q. Who was with you? A. My wife.

Q. And what was your destination?

A. I was coming back to San Francisco. [34]

Q. When had you gone to Blue Lakes?

(Testimony of Allan J. Warner.)

A. A week prior to that.

Q. And on that trip a week prior to that, what was your point of departure?

A. San Francisco.

Q. And were you driving the tractor at that time? A. Yes I was.

Q. Did you have the trailer with you at that time? A. Yes I did.

Q. This was a week prior to the accident, now, is that correct? A. That's right.

Q. And what was your destination at that time?

A. The south fork of Willow Creek.

Q. And was there anything in the trailer at that time? A. Yes, I had 700 feet of pipe.

Q. And where were you taking that pipe to?

A. To Willow Creek.

Q. Who owned the pipe? A. My sister.

Q. Were you carrying it at her request?

A. Yes I was.

Q. Did she pay you for it? A. She did.

Q. All right. Now how long did it take you to get from San Francisco to Willow Creek, if you remember? [35]

A. About nine hours, I guess.

Q. And what did you do when you got to Willow Creek?

A. Well with this pipe I had a load of furniture, too.

Q. Yes. Now tell us about that too.

A. Well that was on the same deal.

(Testimony of Allan J. Warner.)

The Court: Whose furniture was that, was that hers too?

The Witness: My sister's too.

The Court: Well all right, tell us what you did with any equipment that you carried after you got there.

A. Well, she had bought a place up there on the south fork of Willow Creek, and I left the pipe there. I put in a water system for her up there with the pipe. I left the furniture there. Now there was an outfit in Eureka, I think it is in Eureka, but it is up there near Eureka, maybe Korbelt—I forget which it is. There was a big barrel place up there.

The Court: Well, go ahead. What did you do?

The Witness: Well it had been my intentions to get a load out of there back for San Francisco. As a general rule, you try to load both ways. Or, a load of lumber or something else—anything coming out. Well, right at the time there was nothing coming out of that particular territory.

The Court: All right.

The Witness: (Continuing) So I headed back for San Francisco with the tractor. [36]

Mr. Cathcart: Q. Did you leave your trailer up at Willow Creek? A. Yes I did.

Q. Now what time did you leave Willow Creek on the morning that this accident happened?

A. I left Willow Creek at about 5 o'clock, I guess, in the morning.

Q. I see. About what time did the accident hap-

(Testimony of Allan J. Warner.)

pen? A. I would say about 1 o'clock.

Q. In the afternoon? A. Yes.

Q. And was that between Willow Creek and San Francisco that that accident happened?

A. That was between Scotia and San Francisco that it happened.

Q. I see. And is Willow Creek north of Scotia?

A. Yes it is.

Q. On Highway 101, is it?

A. Well no, it is off of 101, it is on a county road.

Q. I see. Well as you came from Willow Creek to Highway 101, where did you hit Highway 101?

A. About 16 miles from 101 on the county road.

Q. Well, I mean on what point on 101 did you hit 101? A. I don't follow you.

Q. Well visualize yourself on the county road.

A. Yes. [37]

Q. You are trying to get to San Francisco. You have told us that you came to Highway 101, is that correct? A. That's correct.

Q. Now where did you come to Highway 101?

A. From a little place called, I think it is Korbel. It is a little lumber town.

Q. But is that on Highway 101?

A. No, it is not on Highway 101, it is on the county road.

Q. Well where do you come into 101? In Eureka? A. Yes, I believe so.

Q. I see. So is this correct, that you left this

(Testimony of Allan J. Warner.)

little place at Willow Creek and drove to Eureka and then went south on Highway 101?

A. Yes, I believe so.

Q. Well, I don't want to mislead you or misquote you. I just want to get what the facts are.

A. Will you repeat it for me?

The Court: Mr. Reporter, would you read the question, please?

(Record read.)

A. That's right.

Mr. Cathcart: Q. And do you recall offhand how far south of Eureka Scotia is?

A. No I don't.

Q. Had you driven that area before? [38]

A. I had been up there a few years before then.

Q. You have relatives up there, do you?

A. No sir.

Q. Was this at the time of any vacation that you had? A. Yes, it was.

Q. And had you spent some of the vacation up there?

A. At the same time I took the lumber up and the pipe and the furniture, I spent my vacation there too.

Q. I see. And this that you talked about doing, for whom was that done?

A. For my sister, my older sister.

Q. She lives up there, does she?

A. Yes, she does.

(Testimony of Allan J. Warner.)

Q. Well I meant by your family, any of your relatives—do some of them live up there?

A. No, she is the only one.

Q. I see. Now you told us that you went up there with your trailer loaded with furniture and pipe and other things—where was the trailer at the time of the accident?

A. At the time of the accident?

Q. Yes. A. The trailer was in Eureka.

Q. I see. And had you left it there?

A. I had left it there.

Q. You had unloaded it. Had you unloaded the pipe and the [39] furniture? A. I had.

Q. And about how long before the accident would it be that the trailer had been unloaded?

A. How long before the accident?

Q. Yes, how many days, if you know.

A. No, not before the accident.

Q. Well I misunderstood you now. Was the trailer still loaded at the time of the accident?

A. The trailer was being unloaded the morning I left.

Q. I see. And it was being unloaded in Eureka?

A. No, at Willow Creek.

Q. At Willow Creek. That is, as you left at 5 a.m., 5 o'clock in the morning, you saw them unloading the trailer?

A. They were finishing unloading my trailer, yes sir.

Q. Now what was your purpose in going to San Francisco?

(Testimony of Allan J. Warner.)

A. There was an installment due on the policy, this policy. It was due on a Monday morning, or it was due, anyway— I forget how many hours I had grace, but that was my reason for coming to San Francisco as I did, without the trailer.

Q. And did you arrive in San Francisco?

A. I did.

Q. Did you make the run from Eureka to San Francisco without the trailer? A. I did.

Q. And did this accident happen on that run?

A. Yes.

Q. When I say "this accident", I mean the accident in which Mr. George Boulter and Mrs. Margretta Boulter received these injuries that we have been talking about. A. That's right.

Q. And on this trip in which you had been going north carrying the load to your sister-in-law, did you say? A. Yes, my sister.

Q. Sister. I beg your pardon. Were there any bills of lading on that trip or anything of that kind?

A. I don't believe there was. It isn't—

Q. Go ahead, I beg your pardon.

A. It is not a common procedure to turn out a bill of lading for a wildcat load.

Q. I see.

The Court: Q. Well you were doing nothing but wildcat load on the whole?

A. That's right.

Q. How would you handle the situation?

A. Well that, there is a notation made of it,

(Testimony of Allan J. Warner.)

and that is to pay my Board of Equalization and California Railroad Commission; there is a notation made, and then it is kept and put aside or entered in the books.

Q. Who enters the notation, you yourself, or someone else on the books? [41]

A. No, my partner, as a general rule.

Q. On books you keep for that purpose?

A. On books we keep for the California Railroad Commission and the Board of Equalization.

The Court: All right.

Mr. Cathcart: Q. On this particular occasion, did you make any entry for this trip for your sister?

A. That I don't know right now for sure.

Q. You mentioned something about some operations in the Willow Creek area. What sort of operations did you mean? A. You see—

Q. Soliciting business, I mean?

A. Soliciting business, exactly.

Q. And did you see anybody up at Willow Creek in connection with that? A. Yes I did.

Q. You did? A. I did.

Q. When was that?

A. That was the morning, I think—let's see, that was on a Sunday morning. I seen the foreman of the lumber company there.

Q. Which particular Sunday morning was that?

A. Well that was the morning, the Sunday morning before the Monday morning that I left for San Francisco.

(Testimony of Allan J. Warner.)

Q. You left up there on Monday morning? [42]

A. Or Saturday morning. I don't know when. It is a long time ago now.

Q. Well whom did you see up there, do you recall?

A. Well, it has been a long time, and that was the first time I had ever been up there. I don't know anybody up there, so I wouldn't know just exactly who it was.

The Court: Well what business were they in?

The Witness: Lumbering.

The Court: Q. The lumber business?

The Witness: There was, or I believe there still is, several backwoods lumber companies up there.

Q. Do they have yards in the little towns?

A. In Eureka.

Q. I see.

A. And at Berkeley, across the Bay, I believe some of the lumber from up in that territory comes down as far as Berkeley. Some of it goes down as far as San Jose.

The Court: All right.

Mr. Cathcart: Q. Well did you have a conversation with this person that you were talking about?

A. Yes, I believe I did.

Q. And you don't recall his name or the names of his company?

A. He didn't tell me his name. He merely asked me if I was interested in hauling lumber out of the valley from the valley floor up there into Eureka and I told him that I was. [43]

(Testimony of Allan J. Warner.)

Q. I see. Now—

The Court: Well, let's follow that up.

Q. What was the status of that negotiation?

A. Of the lumber deal?

Q. At the time you left, yes.

A. Well there was several things that—

Q. Well did he give you any promise, did you get any promise?

A. Well, you see the mill was just opening up.

Q. The main point is this; did you make a deal, did he promise to give you something to carry back?

A. No, the mill wasn't in a position to board lumber yet, it was merely that if I would come back up there in a couple of weeks, when the mill was in a position to run, well, that I would be able to pull the machinery and stuff like that out of Berkeley and lumber back out of Eureka, back to San Francisco.

The Court: All right, go ahead.

Mr. Cathcart: Q. Did you return to Eureka?

A. You mean after the accident?

Q. Yes. A. I did.

Q. How soon?

A. I think it was Wednesday, on a Wednesday.

Q. Now this accident happened on your way to San Francisco, is that correct? [44]

A. That's right.

Q. And after the accident you continued on to San Francisco, is that correct?

A. That's correct.

Q. And how many days did you stay in San Francisco?

(Testimony of Allan J. Warner.)

A. I was in until, I went down to the insurance company and notified the insurance company on Monday morning of the accident, and I paid my premium. That was on a Monday morning. Tuesday morning—Wednesday morning I left for Eureka, back up again. I had had the truck repaired Monday, the tractor rather, here in town. I went back up again to get my trailer.

Q. And do you recall the day when you arrived back in Eureka? A. No, I don't.

Q. Where was your trailer when you arrived back up there?

A. Well my trailer was sitting on my sister's property.

Q. That would be at Willow Creek?

A. That was at Willow Creek.

Q. I see. And then what did you do?

A. Then I came back to San Francisco.

The Court: Q. Well did you pick up your trailer? And the pipes then unloaded from your trailer?

A. Everything had been unloaded. I had a haul at the time with John Dowdell, of San Jose. That is John Dowdell, Draymen; I believe we were hauling concrete pipe out of San Jose for housing projects all over the area, the peninsula area. [45] That was one of the—

Q. Well the point is this; you came back empty?

A. Yes.

Q. You just went back to get the trailer?

A. No, I got my trailer and—

(Testimony of Allan J. Warner.)

Q. By the way, when you came back the first time, when you came to San Francisco, was your wife with you? A. My wife was with me.

Q. When did she come back—was she with you at the time of the accident?

A. She was with me at the time of the accident.

Q. Well did you leave her behind when you went back again? A. Yes I did.

Q. You went back alone? A. Yes.

Q. And you went back to get the trailer?

A. That's right.

Q. And the only reason you came back to San Francisco instead of waiting until the pipe was unloaded was because you wanted to return back and pay this premium?

A. To pay my premium, yes sir.

Q. I see.

The Court: All right, go ahead.

Mr. Cathcart: Q. Now do you know how many days that trailer was at Willow Creek before it was unloaded? [46]

A. No, I don't. I have no idea.

Q. Well you delivered it there, didn't you?

A. I did.

Q. To your sister-in-law's property?

A. That's right.

Q. You parked it in your sister-in-law's property? A. That's right.

Q. Were you visiting her?

A. I was visiting, with my principal reason, as I said, being the pipe. I installed a water system for her up there while I was there.

(Testimony of Allan J. Warner.)

Q. You started right away to do that, did you?

A. I did.

Q. And when did you unload the pipe?

A. I finished unloading it, or they finished unloading it, I got the pipe all used up.

Q. Right away?

A. No, I think I worked on the pipe for about three days. This furniture was taken right off.

Q. The furniture was taken off as soon as you got there? A. That's right.

Q. And how about the pipe?

A. The pipe was: I used it; I took it off. As I was using it, I would take it off joint by joint.

The Court: Q. Did you use it all up? [47]

A. Yes, I did.

Q. I thought you said there was still stuff on that, that other people unloaded it for you?

A. No, there was a stove, a big Wedgewood stove and some other stuff that there was, no, they were not in a position to take this other stuff in right at the time.

Q. You mean your sister?

A. My sister. They had a little place up there; they had bought this place and it had nothing in it, and she would get the place in order for the stuff that they had then, then they would take it off the truck and put it into the house.

Q. Why didn't you leave it on the ground?

A. It is damp up there.

Q. Why didn't you leave the stuff on the ground and take your trailer back?

(Testimony of Allan J. Warner.)

A. Well there are several reasons for that. I don't know if you have ever been up north.

Q. Well the fact is I am not interested in that, I am asking you why you did what you did.

A. Well for me, with a 24 foot down off the mountain, it is difficult to get down to start with, I figured with a tractor, I could make better time. I figured with a tractor, like an automobile, a guy could make better time without pulling a heavy trailer. Which I did.

Q. In other words, you were intending to return back to San [48] Francisco, and your purpose was not just to return, but to hasten back to pay the premium on this policy?

A. To pay my policy.

Q. And then you were going to pick that up later? A. That is true.

The Court: I see. All right.

Mr. Cathcart: Q. Now you said that to make this trip to San Francisco, you could make better time in your tractor without that trailer hooked onto it. Just tell us about that. What do you mean by that?

A. Well that unit, that combination, I guess it is about 30 feet, and the roads up there in that section are fairly narrow. When you want to go around corners up there, you have to get out against the ravine, and it is difficult with a trailer.

Q. Well you could make better time with the tractor, is that correct? A. That's correct.

Q. And in fact, do you drive faster with a trac-

(Testimony of Allan J. Warner.)

tor when it is by itself than when the trailer is hooked on?

A. Not necessarily, not myself personally.

Q. I see. Now when from Willow Creek south to San Francisco for the purpose, as you tell us, of paying a premium on your insurance policy, were you transporting any merchandise?

A. No, I can't say that I was at the time.

Mr. Gray: If the Court please, I think probably to keep [49] the record clear, may that answer go out for a moment?

The Court: All right.

Mr. Gray: I would like to object to that as calling for the conclusion and opinion of the witness.

The Court: No, I don't believe so.

Mr. Gray: In other words, there is a distinction between carrying merchandise physically and in the legal sense; I am aware of the fact that physically he wasn't carrying merchandise.

The Court: Well, that is what he is asking for.

Mr. Gray: Well if that is what it is, I have no objection.

The Court: Well, ask it in a different manner.

Q. You weren't carrying anything coming home? A. Coming home, no sir.

Q. In other words, you had no new load, and the load that you had brought up had either been used up, as in the case of the pipe, or it was still on the trailer when you left there?

A. Yes sir.

Q. I see. To be removed later on?

(Testimony of Allan J. Warner.)

A. Yes.

Q. I see. All right.

Mr. Cathcart: And now you told us that after you returned to Eureka, you picked up your trailer? A. Yes.

Q. How many days was that after you had returned to Eureka? [50]

A. That was on Wednesday. I paid my—

The Court: Premium?

The Witness: Yes. I paid my premium on Monday. Tuesday—or Monday afternoon, I went up and I had the truck gone over to get rid of the effects of the accident. Wednesday morning I left for Eureka again.

Q. Yes. You arrived back in Eureka on Wednesday?

A. I arrived back in Eureka about 12 o'clock, I think, Wednesday night.

Q. And your truck was where at that time, when you saw it? A. The trailer?

Q. Yes, I mean the trailer. I beg your pardon.

A. The trailer was where I had left it.

Q. At your sister-in-law's? A. Sister's.

Q. Sister's. I don't know why I keep making that mistake. Then when did you come back again?

A. Thursday morning.

Q. The very next Thursday morning or a week later?

A. No, that same Thursday morning.

Q. I see. And was your trailer loaded as you made that trip south?

(Testimony of Allan J. Warner.)

A. Well I had a big range and some other stuff coming back home.

Q. Who owned that range? [51]

A. It belonged to my sister too. I got \$64 bringing it back.

Q. And where did you deliver that?

A. I delivered that, to, I believe, my mother's place, at Number 10 Ord Court.

Q. I see. Then was it after that that this San Jose contract came up that you were telling us about?

A. That's right, the following morning, I believe that was a Friday morning. I left for Carmel.

Q. Yes. I see. Now did you get that contract after you got back to San Francisco?

A. I did.

The Court: Q. You didn't have that range going up, did you? A. Yes I did.

Q. She couldn't use it and sent it back?

A. She couldn't use it.

Q. Oh, I see. All right.

Mr. Cathcart: Q. When you took this—would you review this for me again a moment? When you took this cargo on your trailer up there—this is now before the accident happened—was your wife with you at that time?

A. My wife was with me.

Q. I see. And did she return the second time?

A. Back to Eureka?

Q. Yes. A. No, she didn't. [52]

(Testimony of Allan J. Warner.)

Q. I see. How much does the tractor and trailer weigh altogether, do you recall?

A. The tractor weighed $2\frac{1}{2}$ tons. The trailer weighed 3 tons, I believe. $5\frac{1}{2}$ tons.

Q. It was a $5\frac{1}{2}$ ton combination?

A. Approximately.

Q. I see.

Mr. Cathcart: I think that is all.

The Court: All right, you may cross-examine.

Cross Examination

By Mr. Gray:

Q. Mr. Warner, you were subpoenaed here to-day by me, is that right? A. I believe so.

Q. Yes. And in the action in the State court, you were represented, were you not, by Dana, Bledsoe and Smith, the lawyers for this insurance company, is that right? A. Yes I was.

Q. And then there was another proceeding which they had, these lawyers and this insurance company, with you, before Judge Goodman?

Mr. Cathcart: Now just a moment. If your Honor please, that is outside the issues in this case. We object to it on the ground that it is incompetent, irrelevant, and immaterial. [53]

The Court: Well, I think the relationship between the witness and counsel is material, as going to interest or bias or anything like that that counsel may wish to bring out.

Mr. Cathcart: Surely.

(Testimony of Allan J. Warner.)

The Court: We are not going into the lawsuit merely to show the lawsuit.

Mr. Cathcart: Well that was the only reason I was objecting.

Mr. Gray: That was the reason I was doing it, your Honor.

The Court: Very well, go ahead.

Mr. Gray: Q. Now Mr. Warner, when you were brought before Judge Goodman at the request of Mr. Bledsoe of this same law firm—is that correct? A. Yes sir.

Q. —and while you were before Judge Goodman, you gave certain testimony under oath, didn't you? A. Yes sir, I did.

Q. And in that hearing you were asked certain questions concerning the purpose of your trip up there to Willow Creek, is that right?

A. That's right.

Q. And I will ask you whether or not in that hearing before Judge Goodman, Mr. Bledsoe of this same law firm that represents the insurance company did not ask you certain questions.

The Court: I presume, counsel, if you have a transcript [54] of the testimony, counsel will probably stipulate that the questions were asked and answered.

Mr. Gray: Just a moment, your Honor, until I find the part I want.

Q. Now I will show you this transcript here. page 6, lines 3 to 12, and ask you whether these

(Testimony of Allan J. Warner.)

questions were asked of you and these answers were given before Judge Goodman.

Mr. Gray: Shall I read them, your Honor?

The Court: I beg your pardon?

Mr. Gray: May I read them?

The Court: No, I think the proper way is just to show them to him. If counsel will stipulate that he asked the questions and that the answers shown were given, I don't think you need read it.

Mr. Gray: Q. Would you read these that I have marked here? (Handing to witness.)

The Court: Don't read them out loud.

Mr. Gray: Just read them to yourself.

Mr. Cathcart: What is he reading, counsel?

Mr. Gray: He is reading on Page 6, lines 3 to 12.

Mr. Gray: Q. You have read those. I will ask you whether those questions were asked and those answers given by you? A. Yes, they were.

Mr. Gray: And if the Court please, they are as follows: [55]

"Mr. Bledsoe: Q. This trip was in the nature of a vacation trip for you, wasn't it?

"A. It was a combination.

"Q. What was the nature of the combination?

"A. Business had been very slow about that time of the year and we had gone up into Willow Creek for an outfit up there, California Barrel. We had intended, if possible, to haul barrels out of Willow Creek.

(Testimony of Allan J. Warner.)

“Q. Did you see someone while you were up there about that?

“A. No, I did not.”

Mr. Gray: Q. Now in this hearing before Judge Goodman, Mr. Warner, did you testify to anything about stoves, pipe, or furniture?

A. No, I didn't.

Q. Nothing was said about that?

A. (Witness nodded in the negative.)

Q. Now this tractor that is in your insurance policy is the same tractor as involved in this accident, is that right? A. That's right.

Q. Now were you paid for taking this pipe and other material up there? A. Yes sir, I was.

Q. How much were you paid? A. \$75.

The Court: Q. What size pipe was it?

A. One inch pipe.

Q. How much did you have, 750 feet?

A. I think it was 700 feet.

Q. How much did it weigh, do you know?

A. About, I should say for the whole load—I had about 6 ton.

Q. Including the stove?

A. Including the rest of the furniture, yes sir.

Q. All right. What capacity was the trailer?

A. Carrying capacity?

Q. Yes. A. Fifteen ton.

Q. That is the way it is registered, that amount?

A. I don't remember how it was registered now.

The Court: I see, all right.

Mr. Gray: Q. Now this accident occurred on

(Testimony of Allan J. Warner.)

Highway 101, is that right? A. I believe so.

Q. That is the redwood highway?

A. Yes.

Q. And at the time of this accident, were you taking the most direct route as far as you know from Willow Creek back to San Francisco?

A. Yes I was.

Q. Now you testified that the purpose in coming back was to pay [57] the premiums on the insurance policy. Is that the insurance policy here involved in this case? A. Yes.

Q. You were paying the premiums on that?

A. Yes sir.

Q. And you also testified that at the same time you notified the company of the accident?

A. Yes sir.

Q. And did you describe the accident to them at the time you notified them? A. I did.

Q. And did you give them the premiums at the same time? A. Yes sir, I did.

Q. They accepted the premiums?

A. They did.

Q. Well now let's see if we can get this straight about this trailer being unloaded up there. Was this trailer at the time you left Willow Creek loaded or unloaded?

A. The trailer was still partially loaded.

Q. Still partially loaded? A. Yes, sir.

Q. And you left it there for the purpose of being unloaded?

(Testimony of Allan J. Warner.)

A. Well not primarily to be unloaded, but so I could get out of there right then.

Q. All right. But was it your intention that the trailer be [58] unloaded at that time?

A. That's right.

Q. It was to be unloaded? A. Yes sir.

Q. And you intended to return for the trailer, is that correct? A. That's right.

Q. Now at the time—you testified also about a vacation. At the time that you were returning to San Francisco, you were involved in that accident; were you still on your vacation?

A. No, I don't believe I was.

The Court: Q. Well, you were on your own business? You were your own boss? You decided where the vacation began and ended, didn't you?

A. Well, no sir.

Mr. Gray: Q. What is your answer, were you on vacation or not? A. No, I wasn't.

Q. You weren't. Now you testified that you also came down to discuss with someone in San Jose the hauling of a load, is that true?

A. Yes, sir.

Q. Was that one of your purposes in coming down to San Francisco?

A. Well not my principal one, no.

Q. Was it one of your purposes?

A. One of my purposes. [59]

Q. It was one of your purposes to come to see about it. To whom were you going to go, to John Dowdell? A. Bob Dowdell.

(Testimony of Allan J. Warner.)

Q. Who is he?

A. He is listed in the San Jose directory as John Dodwell, Draymen. They have been there for years and years.

Q. And had you hauled for him before?

A. Yes I had.

Q. So that one of your purposes was to talk to him about hauling merchandise?

A. That's right.

Q. With this trailer and tractor, is that right?

A. Yes sir.

Q. Now when you returned to Willow Creek, was the trailer in the same condition? Had any more merchandise been taken out of it?

A. It was completely unloaded, with the exception of this range and some odds and ends of furniture to come back to San Francisco.

Q. Then if I understand you correctly, while you were making your return trip, someone had taken out the rest of the merchandise, except this range and this other item you mentioned?

A. Yes sir.

Q. So some of it was removed while you were en route back, is that right?

A. That's right.

The Court: Q. As I understand it, then, the only reason why you left there was as an accommodation to your sister, is that right?

A. Yes, it is.

Q. So that whatever was on the trailer would remain there until she found a place for them, or she made up her mind as to what you were to take

(Testimony of Allan J. Warner.)

back, is that true? A. Yes, sir.

Mr. Gray: Q. Now in wildeatting, as you describe it, is it customary or do you do that frequently—leave your trailer with merchandise to be unloaded while you do something else?

A. Yes, it is.

Q. Nothing unusual about it?

A. No, it is not unusual.

Q. You have done it before, have you?

A. Yes sir, I have.

Q. And in your experience in that business, is it customary, is it an ordinary or usual thing?

A. It is.

The Court: Well, you wouldn't ordinarily leave it behind to come back for it unless you knew—

A. Not on a trip that far.

Q. You wouldn't go that far unless you knew that you would have a load that would warrant your taking the trip back and forth? [61]

A. Yes sir.

Q. Because what you got for hauling that wouldn't pay you for coming down to San Francisco and going back again, then coming back to San Francisco? A. No, it wouldn't.

The Court: I see, all right.

Mr. Gray: Q. Well Mr. Warner, in telling the story about this incident, you have changed this story a number of times, haven't you?

A. No, I don't believe so, materially. The only thing is, something else happens to occur to me

(Testimony of Allan J. Warner.)

that somehow or other I have either overlooked or something.

Q. Well you told the story, didn't you, in the office of Mr. Bledsoe, Messrs. Bledsoe, Dana and Smith over here, these lawyers for the insurance company, haven't you? A. I have what?

Q. You told the story in the office of these lawyers for the insurance company, didn't you?

A. Just exactly how do you mean?

Q. Well I mean this:—

The Court: Well, they don't use the word "story". That would have a bad connotation. A child tells a story—it means something untrue. Use the word "version".

Mr. Gray: All right.

Q. You have given your version of the facts at the office [62] of the insurance company lawyers, didn't you? A. Yes sir.

Q. You did before this trial in the State Court?

A. Yes sir.

Q. You went over it with them, told them about it, is that right? A. That's right.

Q. And did you ever give them a written statement? A. Yes, I did.

Q. You did give them a written statement, too. And do you know whether or not you told them about hauling pipe and furniture for your sister?

A. I did not.

Q. You don't think you told them that?

A. I know I didn't.

Q. You didn't tell them that. And you testified

(Testimony of Allan J. Warner.)

to that before Judge Deasy, though, when we filed suit in the Superior Court, didn't you?

A. I believe I did.

Q. Well now—the testimony you gave before Judge Deasy, regarding the hauling of the pipe, and that which you have given today, that is true, is it?

A. Yes sir.

Q. That is the true version?

A. That is the true version of it. [63]

Q. And any other version you may have given is untrue?

A. No, I wouldn't say it was untrue. As I see it, the only thing that I have—I mean, that I can say—well, I have said it, I have no proof of it.

Q. I see.

The Court: Q. What you mean to say is that sometimes you omitted something. Why did you omit the facts that you were carrying—

I am going to ask this leading question, although you are cross-examining him too; but I am permitted to ask that to see what the answer would be, and to give him a chance to explain. I will put it that way.

Q. Did you leave that out deliberately, or did you just forget it or what?

A. No sir, the way I seen it, the way I understood, I was insured. It didn't seem to matter whether I had 10 ton or no tonnage or anything. The papers, the insurance papers as I read them, had nothing on them as far as I could understand

(Testimony of Allan J. Warner.)

about being without a trailer or with a trailer or anything with a load or without a load.

Q. Yes, but as to the trailer, the insurance said that it was for while you were carrying goods. Do you remember that portion of it?

A. No, I don't.

Q. You don't remember that? [64]

A. No sir, I don't.

Q. Well, now, why did you leave out that that was the purpose of the trip? The trip had that purpose; why did you leave it out?

A. Well—

Q. Why did you leave it out when you were testifying?

A. Well the way I seen it, it didn't seem important to me.

Q. It didn't seem important to you?

A. No sir.

Q. Well didn't it occur to you that that was an incident that you ought to tell about, as you would tell them about going on vacation?

A. No sir.

Q. It didn't occur to you? A. No sir.

The Court: I see. All right.

Mr. Gray: No further questions at all.

The Court: All right. Any redirect?

Mr. Cathcart: Yes, one or two questions, if your Honor please.

(Testimony of Allan J. Warner.)

Redirect Examination

By Mr. Cathcart:

Q. To whom did you report this accident, if you remember?

Mr. Gray: You mean at the insurance company?

Mr. Cathcart: Yes. [65]

A. I think it was—the first place I went, I believe, was this place I figured was 111 Pine, unless I am mistaken. I could be. I seen, I was sent from there to some place else. I believe it was an adjuster. What his name is, right now I don't remember. He came out and looked at the tractor, took my statement, and that's all.

Q. And did you pay him the premium that you were telling us about?

A. No sir, I didn't. I paid the premium at the offices of the Commercial Standard.

Q. Is that in San Francisco?

A. I believe it is.

Q. Now would that be the office of Commercial Standard or one of your, your own insurance agent?

A. No, I believe it was the agent or representative for the Commercial Standard.

Q. I see. And had you done business with him before?

A. No, not that I can ever recall.

Q. Well this policy, where did you get it?

A. Oh, I don't know just exactly how I got the policy, through somebody that knew somebody, and they referred me to the Commercial Standard or

(Testimony of Allan J. Warner.)

something like that. I don't know just exactly how it did come about.

Q. Well do you remember who actually delivered the policy to you? [66]

A. No, I don't.

Q. Nor where?

A. No, I don't know that either. It seems to me though, that it came in the mail.

Q. And you had talked, of course, to somebody about it beforehand, had you?

A. About the policy?

Q. Yes.

Mr. Gray: Objected to as incompetent, irrelevant, and immaterial. I don't see the need for this inquiry, especially on redirect.

The Court: I will sustain the objection. We are not talking about the circumstances of when the policy was entered into.

Mr. Cathcart: Surely.

Q. And there is of course a service by mail from this little town of Willow Creek to San Francisco, is there? A. What?

Q. Are there mail connections from Willow Creek to San Francisco?

A. Yes, I believe there are—rural.

Q. I see. As you went up to Eureka, were you aware that your premium was falling due?

A. That was the purpose of my making the trip.

Q. I mean as you went north?

A. As I went north. That was the purpose of

(Testimony of Allan J. Warner.)

my trip north, the [67] money from that to pay the premium.

Q. Oh, you mean—let me get this correct now. The money which you hoped to get from your sister for carrying this load north, you intended to use that in paying your premium, is that correct? A. To pay my premium, that's correct.

Q. I see. Have you ever discussed any of these matters with Mr. Gray, this gentleman here? (Indicating.)

A. No, not as far as I know.

Q. As far as you know, you had never seen him before the State Court action, is that right?

A. No, I hadn't. I don't believe so.

Q. Yes. He asked you about me, so I thought I would ask you about him.

The Court: All right.

Mr. Gray: Let's get this clear.

Recross Examination

By Mr. Gray:

Q. You saw me in the State Court and you saw me here, outside of that you never saw me?

A. No sir.

The Court: That is what he meant.

Mr. Gray: Q. Paying this premium, you paid it at the same place you customarily paid the premiums, always?

A. No, I didn't, I don't think. As a general rule I think it [68] was paid to the bank, and just exactly how it was done, I don't know; but it seems to me it was paid to the bank and then the bank

(Testimony of Allan J. Warner.)

paid it to the insurance company or something like that. Anyway, I went to this particular place where I was to pay the payment. First of all I went and notified the insurance company of the accident. I told them that I had a payment due, and they told me to hustle right down and make the payment. They told me to pay the premium, which I did. I had never been there before. It is the first time that I had ever been there. I believe it was on Pine Street, though.

Mr. Gray: That is all.

The Court: All right.

Mr. Cathcart: Just one or two questions.

Further Redirect Examination

By Mr. Cathcart:

Q. What was the name of your partner in this operation? A. Robert W. Woodrow.

Q. And are you and he still partners?

A. No sir, we are not.

Q. He is here in San Francisco?

A. I believe he is now.

Mr. Cathcart: Yes, that is all. Thank you.

The Court: All right, step down.

(Witness excused.) [69]

* * * *

Mr. Cathcart: All right, your Honor. Shall we discuss the instructions now?

The Court: No, if you are going to make a motion for a directed verdict, I will rule on that and then I will tell you about the instructions.

Mr. Cathcart: Yes. Well at this time then, if

your Honor please, I will make a motion for a directed verdict on the ground that it has been shown by evidence that at the time this accident happened, the vehicle, the Dodge tractor, was not being used for the transportation of merchandise within the meaning of the policy which is in evidence. [73]

Now the policy is very specific in its terms, and it is very clear. It says, "The automobiles described are and will be used only for transportation of merchandise purposes and will be operated as follows . . . and this insurance covers no other use or operation."

Now the law is very clear on the point that coverage will not be extended beyond the express terms of the policy merely because it would be nice to have the plaintiffs recover a judgment from the insurance company. A very slight departure from the uses for which the insurance exists has served on numerous occasions to rule out the liability on the part of the insurance company.

* * * *

[74]

Mr. Gray: Continued until tomorrow morning? The whole thing is continued until tomorrow morning?

The Court: Yes, I will continue the whole matter and re-open the case to allow you to re-amplify. Then we will excuse the jury and hear additional argument on the motion.

* * * *

[113]

Mr. Gray: Call Mr. Warner for further cross-examination. [115]

ALLAN J. WARNER,

recalled as a witness on behalf of the defendant,
previously sworn, testified further as follows:

Cross-Examination

By Mr. Gray:

Q. Mr. Warner, I had a discussion with you after the hearing yesterday, outside the courtroom, is that true? A. Yes, sir.

Q. Now in that discussion we discussed some of the facts pertaining to this case. Now yesterday you testified that one of your purposes for making this trip was to talk to John Dowdell, who is in the drayage business in San Jose, is that correct?

A. Yes, sir.

Q. And at the time of this accident, you were on U. S. Route 101, is that right?

A. That's right.

Q. And that is the most direct route, is it not, from the point where you left your trailer to San Francisco, and also to San Jose?

A. Yes, sir, it is.

Q. In other words, San Jose is below San Francisco, south of San Francisco?

A. That is correct.

Q. Now you also told us that you were in the wilcatting [116] business. I wish you would tell us a little more about that. That means, does it not, that you frequently take your equipment and go from place to place and haul for whomever will hire you? A. That's correct.

Q. Is that right? A. That's right.

(Testimony of Allan J. Warner.)

Q. In other words, you don't start always from your home at 10 Ord Street, San Francisco, you may start from any place where you happen to be, where you could locate a job, is that right?

A. That's right.

Q. Now is it true that in wildecating, it is common practice to sometimes take a trailer that is already loaded instead of your own trailer?

A. That is true, too.

Q. In other words you take your tractor and attach it to a trailer for some company or individual who has a load and then you attach your tractor to the trailer and drive the load for him?

A. That's right.

Q. That is common practice in wildecating, is it?

A. Yes, it is.

Q. And you were engaged in the business of wildecating, is that right? [117]

A. That's right.

Q. Referring now to Dowdell, do you know whether or not he has such trailers?

A. Yes, he does.

Q. He has such trailers. Now I believe you made the statement yesterday in Court that while you intended to see or communicate with Dowdell, you didn't do so? A. No, sir, I didn't.

Q. All right. It is true that this accident disabled your tractor, is it not?

A. That's correct.

Q. The accident here involved. You had some emergency repairs made to the tractor at Scotia?

(Testimony of Allan J. Warner.)

A. I did.

Q. They tied it up for about a day, is that right? A. That's right.

Q. And then those were only emergency repairs, is that right? A. That's right.

Q. Then when you went from Scotia to San Francisco, did you take your tractor and have repairs made to it of a permanent nature?

A. In San Francisco.

Q. And in San Francisco your tractor was then tied up for some period of time because of repairs?

A. It was tied up for a day and a half. [118]

Q. A day and a half because of repairs. Now is that the reason why you did not communicate with Dowdell, because you didn't have your tractor available?

A. Well, I guess that would be as good a reason as any.

Q. Well the point is, you didn't have any tractor to haul, did you. A. No, sir.

Q. Well, let's get this clear. Did you own any other tractor? A. No, I didn't.

Q. Did you have any other equipment for hauling, other than this tractor and the trailer that was up at Willow Creek at that time?

A. Nothing licensed.

Q. At that time? A. Nothing licensed.

Q. Nothing licensed at that time?

A. That's right.

Q. All right.

The Court: Q. In other words, you couldn't

(Testimony of Allan J. Warner.)

and just tack it on and make a trip for someone? You said you had nothing licensed. By that you mean that you couldn't pick up another trailer and hitch it on to your tractor?

A. Not my own trailer.

Q. You would have to have a licensed trailer?

A. A licensed trailer. [119]

The Court: I see. All right.

Mr. Gray: Q. Well these trailers you say others had, like Dowdell, those were licensed trailers?

A. Yes, they were.

Q. But you had no other licensed trailer other than the one you left at Willow Creek?

A. That's right.

Q. Well then, as far as the tractor itself, in your wildecutting, have you ever used that for hauling merchandise?

A. Yes, sir, I did.

Q. And what have you hauled in that?

A. I have hauled practically every commodity.

Q. And I believe you told me you hauled burlap sacks, about 700 pounds of burlap sacks with that?

A. Yes, I did.

Q. So you can use that equipment for hauling?

A. Yes, you can.

Q. And you did use it for hauling?

A. I have used it many times.

Q. And under this same permit that you had, you used that tractor for hauling?

A. Yes, sir.

Q. I think I asked you this question: In your wildecutting work, much of your work is for other

(Testimony of Allan J. Warner.)

haulers? A. Yes, it is. [120]

Q. In other words, they are subsidizing you—they have something to haul and for some reason or other they don't have enough equipment available, then they let you do the hauling for them and they pay a certain percentage or some amount for it, is that right? A. That's right.

Q. And that is why you frequently take their trailer instead of your own, if they have it loaded, is that correct? A. Yes, sir.

Q. And attach it to your tractor. Then you told me, didn't you, that you went back to get your trailer after the repairs had been made, because you had been in communication with Augustine V. Fries? A. That's right.

Q. He was a regular customer of yours?

A. He was a produce merchant.

Q. I mean he was a man you had worked for before? A. Yes, sir.

Q. And you went to get the trailer in order to have it available for him, is that correct?

A. That's right.

Q. Working for him.

A. (Witness nodded in the affirmative.)

Q. And for hauling? A. For hauling.

Q. Yes. Now I notice, Mr. Warner—

Mr. Gray: Counsel, I will call your attention to the testimony before Judge Deasy in the Superior Court on Page 7, line 17, over to page 8—say about line 3.

Mr. Cathcart: All right.

(Testimony of Allan J. Warner.)

Mr. Gray: Q. I will call your attention in your testimony before Judge Deasy, where, instead of referring to "Willow Creek," you refer to "Blue Lake". Do you recall that or would you like to look at the testimony?

A. Well as far as I know, it is one and the same.

Q. Well look it over. I don't want to confuse you. That was under cross-examination before Judge Deasy.

(Handing to witness.) I have marked it in the margin there, Mr. Warner. When you have read that, turn the page. I think I have got three lines on the other page. Have you read it?

A. Yes, I have.

Q. Thank you. This reads as follows: (Reading.)

"Q. Now calling your attention to the date of the accident, June 22, 1946, you were driving this Dodge Truck, is that correct? "A. Yes, sir.

"Q. What direction were you going?

"A. I was heading South.

"Q. And where had you been? [122]

"A. I had been to Blue Lake.

"Q. And that is in Lake County, is it?

"A. That is in Lake County.

"Q. Well had you left what you call the device in the back, the trailer? "A. The trailer.

"Q. Had you transported the trailer up there?

"A. I had taken the trailer up with a load of pipe.

"Q. Where had you taken it?

(Testimony of Allan J. Warner.)

“A. To Blue Lake.

“Q. From where?

“A. From San Francisco.”

Now these questions were asked of you and those answers were given by you before Judge Deasy, were they? A. That's right.

Mr. Gray: I might state, counsel, that as to Lake County, I think that was a mistake that was corrected later. It was my fault. I said “Lake County” because I happened to know there was a Blue Lake in Lake County, so I am not holding the witness to that point. The question was wrong.

Mr. Gray: Q. The point I am making is, is it Blue Lake or Willow Creek?

A. Well, it is Blue Lake, if I remember correctly.

Mr. Gray: Is it on there? [123]

Mr. Cathcart: Willow Creek and Blue Lake. (Indicating)

Mr. Gray: Well here, counsel showed me a map. His eyes are a little better than mine. (Examining map.) He has taken a pencil and circled a place called Blue Lake. He has also taken a pencil and circled a place called Willow Creek, also Eureka is circled.

Q. Now would you look at that map—can you see this? If you will hold it? Look at the map and see whether that will help you straighten us out. (Handing to witness.)

A. It is all on a direct route.

(Testimony of Allan J. Warner.)

Q. Well I realize that. In other words, you probably drove through one or the other?

A. You go through all three.

Q. Where did you go, where did you dump the load of pipe and furniture, or whatever it was?

A. At Willow Creek.

Q. Willow Creek?

A. You get to Willow Creek, and you have to go through Blue Lake, I believe.

Q. Oh, Blue Lake. According to that map, that seems to be quite a distance.

A. I don't know what the scale is.

Mr. Gray: I don't know if a scale is on here. Is there a scale on here, counsel, do you know?

Mr. Cathcart: Yes, I believe there is. [124]

Mr. Gray: Oh, yes.

Q. Well according to this scale, it was at least 20 miles or more?

A. That's right.

Q. Well, so then, when you testify in one proceeding about Willow Creek and in another about Blue Lake, you have reference to one and the same place?

A. That's right.

Q. Well which place do you have reference to?

A. Willow Creek.

Q. You have reference to Willow Creek? and not Blue Lake?

A. Yes.

Mr. Gray: Thank you, counsel. (Handing map to Mr. Cathcart.)

No further questions.

(Testimony of Allan J. Warner.)

Redirect Examination

Mr. Cathcart:

Q. Now on this trip to San Francisco when you were in the tractor and when the accident happened, you tell us this morning, after having talked with Mr. Gray, that you had the intention of seeing Mr. Dowdell in San Jose, is that correct?

A. That's correct.

Q. Did you see him? A. No, I didn't.

Q. Had you been in communication with him before you went to San Jose? A. Yes, I had.

Q. You had? When?

A. The month prior to that.

Q. When you were down in San Francisco, is that right? A. That's correct.

Q. And had you hauled for him during the month prior to that? A. I had.

Q. And during that month, whose trailer had you used? A. My own.

Q. Your own? A. Yes.

Q. And when did you next see Mr. Dowdell or speak with him or have any communication with him after this accident? A. In July.

Q. In July of the following year?

A. Of the following month.

Q. I mean, the following month, yes.

A. Yes.

Q. I see. At about what time in July, do you recall?

(Testimony of Allan J. Warner.)

A. Somewhere between the 8th, I should say, and the 26th.

Q. I see. Then you testified yesterday that you were not transporting any merchandise at the time of the accident, is that correct? [126]

A. That's correct.

Q. And accordingly, although you testified this morning for the first time that you occasionally carried loads on your tractor, you were not carrying any load on your tractor at the time of this accident, is that correct? A. That is true.

Q. On what occasions had you carried loads on your tractor?

A. I have carried loans on the tractor many times.

Q. Well, tell us some of those occasions.

A. Oh, I think it was the Sunday—let's see, I don't know what day that would have fallen on. I think it was the Sunday, about the 28th, from the 20th of June through August—July, August, and September, I hauled sacks down into the valley on the tractor. I hauled 10,000 sacks.

The Court: Q. How much of a load could you carry?

A. About 700 pounds.

Q. That is all? A. That is all.

Q. In other words, you couldn't carry sack material, like cement or sand or anything else?

A. Oh yes, I could.

Q. Well what did you actually carry, empty sacks? A. Empty sacks in bales.

(Testimony of Allan J. Warner.)

Q. That you tie? A. Tie, yes. [127]

Q. Had you ever carried loads for this Mr. Dowdell like that? A. No, I never did.

Q. What kind of hauling did he do?

A. General merchandise, general freight, everything.

Q. And the particular work that you had in mind wouldn't be that type, or would it be—what?

A. No—for the tractor alone?

Q. Yes. A. No, it wouldn't.

Q. It wouldn't be? A. No.

The Court: I see, all right.

Mr. Cathcart: Q. Now, you testified that you were hauling sacks on the 28th of June; of what year would that be? A. That was '46.

Q. Well now how long after the accident was that? A. I should say about five days.

Q. Five days after the accident. And where was that hauled? A. That was to Hayward.

Q. From where? A. San Francisco.

Q. Then during the period from five days after the accident, for the rest of June and all of July, August, and September, you were hauling sacks on your tractor, is that correct? A. Yes, sir.

Q. Where was your trailer all that time?

A. In San Francisco.

Q. And on this particular job, you did not use your trailer, is that correct?

A. I didn't, that's right.

Q. Who was this man Fries that you refer to?

A. He is a produce broker.

(Testimony of Allan J. Warner.)

Q. Is he the man for whom you hauled the sacks? A. That's right.

Q. Where is his office?

A. He had a place on California street.

Q. Here in San Francisco? A. Yes.

Q. Yes. Now Mr. Gray referred to a point of your testimony which you gave when you were being examined by him in the state court. You went down as far as page 8, line 3; now I will ask you to read from there on to page 10, line 19, and ask you if those questions were asked you by Mr. Gray and if you gave those answers.

Mr. Gray: What is this, cross-examination?

Mr. Cathcart: No, this is putting it all in, putting in the entire testimony.

Mr. Gray: I have no objection. Put the whole thing in if you want.

The Court: I will say, gentlemen, the position of this [129] witness has changed. It is quite evident at the present time that he is being used to establish some affirmative facts which were not brought out on direct examination, which may be contrary to what was brought out; so to that extent he has become your witness, and we cannot stand on the technicality that he is not your witness.

Mr. Gray: Well, I have no objection to him reading this into the record, your Honor.

The Court: I see. All right. I just wanted the record straight, that is all.

Mr. Gray: What line is that?

Mr. Cathcart: Excuse me.

(Off the record discussion between counsel.)

(Testimony of Allan J. Warner.)

Mr. Cathcart: Q. Now were those questions asked you by Mr. Gray in a proceeding in the State Court? And did you give those answers?

A. I did. I guess I did.

Mr. Cathcart: Well, I take it, counsel, it is stipulated that you did ask him those questions and that he did give those answers?

Mr. Gray: I have no objection to you reading any part of this to the jury.

Mr. Cathcart: Then, ladies and gentlemen of the jury, I will continue on from where the witness read when he was being asked by Mr. Gray to read his testimony in the state court. [130] You will recall that he said—this is on page 8, line 1, of his testimony in the state court: (Reading.)

“A. I had taken the trailer up with a load of pipe.

“Q. Where had you taken it?

“A. To Blue Lake.”

And as the map shows, Blue Lake is a little town between Eureka and this little community of Willow Creek. It is a little—just a moment, I might get the map so that we can see it.

“Q. From where?

“A. From San Francisco.

“Q. From some company?

“A. Not for some company, for a relative that had a summer home up there.

“Q. You transported pipe for a relative?

“A. That's right.

“Q. Were you ever paid for it?

(Testimony of Allan J. Warner.)

"A. Yes, I got \$75 for the haul.

"Q. And you brought the pipe to Lake County?

"A. That's right."

Again, Lake County means this little community, Blue Lake or Willow Creek, whichever it is.

"Q. And you brought the pipe to Lake County?

"A. That's right.

"Q. And you left the trailer there, did you?

"A. That's right. [131]

"Q. With the pipe on it?

"A. No, the pipe had been taken off.

"Q. Well what was your destination at the time of this accident?

"A. I was on my way back to San Francisco.

"Q. Well, did you intend to come back to get the trailer?" "A. I did.

"Q. And you eventually did go back to get the trailer?" "A. I did.

"Q. When did you do that?

"A. About five days later.

"Q. Was anybody traveling with you?

"A. No, the second trip, no."

That is the second trip, when he drove back to get the trailer.

"Q. At the time of this accident?

"A. At the time of the accident, my wife was with me.

"Q. What is her name?

"A. Mrs. Jane Warner."

There is a question mark over "Jane."

Mr. Cathcart: Q. Is your wife's name Jane?

(Testimony of Allan J. Warner.)

A. It is June.

“Q. Is she in Court? “A. No, sir.

“Q. Where does she live? [132]

“A. Number 10 Ord Court.”

Q. Now those questions were asked by Mr. Gray and those answers were given by you in the State Court? A. Yes.

Mr. Gray: Continuing, it goes on: (Reading.)

“Q. Well, had your wife been with you from the time you started out from San Francisco with the pipe? Did you take her along with you?

“A. No, she had been up there on vacation.

“Q. She was in Lake County?”

In Blue Lake, I take it.

“A. That’s right.

“Q. Let’s see if we have the facts right. Your wife was at Blue Lake, Lake County, and you were in San Francisco? “A. That’s right.

“Q. And a relative of yours ordered a load of pipe and you agreed to transport the pipe to Lake County for this relative for a certain sum of money, is that right? “A. That’s right.

“Q. And were you paid that money?

“A. That’s right.

“Q. And that went into the partnership, is that right? “A. That’s right.

“Q. Then you took the trailer and the tractor that were hitched together with a load of pipe and went from San Francisco [133] to Lake County?”

Again, Blue Lake.

“A. Yes, sir.

(Testimony of Allan J. Warner.)

“Q. And there you disconnected the tractor and left the pipe, you disconnected the trailer from the tractor and left the pipe in Lake County? Is that right?”

Well, Blue Lake again, I guess.

“A. That’s right.

“Q. At the time of this accident, you were returning to San Francisco? “A. That’s right.

“Q. You were returning back to continue with your business?

“A. No, I had a definite purpose in coming down, I might state. I had a payment due on my insurance policy Monday. My policy would lapse if I did not get in here Monday. That was the reason for coming down Frisco, here.

“Q. So you came down for that business?

“A. That’s right.

“Q. And when did you intend to return for your tractor? “A. The following day.

“Q. For your trailer?

“A. The following day.”

I take it that Mr. Gray said “tractor” when he meant “trailer”, so he corrected the question. [134]

“A. The following day.”

Mr. Gray: I may say, counsel, that during that trial I thought it was a truck, and sometimes I called it a truck and sometimes a tractor. I meant the same thing.

Mr. Cathcart: Yes. (Reading.)

“Q. That would have been Tuesday?

“A. Yes.

(Testimony of Allan J. Warner.)

“Q. And what day did this accident occur?

“A. That happened on a Saturday.

“Q. Now going back to the Dodge Tractor, that was registered with the Department of Motor Vehicles, wasn't it? “A. With the what?

“Q. It was registered with the Department of Motor Vehicles like an automobile? “A. Yes.

“Q. That was registered in your name and Mr. Woodrow's? “A. That's right.

“Q. As joint owners, and you were using it that day and Mr. Woodrow knew you were using it?

“A. That's right.”

That is all I care to read from this at this time.

Mr. Gray: Do you want to read the rest of that down there? It is on the subject. Why don't you finish the subject?

Mr. Cathcart: If it is pertinent, I don't want to exclude [135] anything.

Mr. Gray: It has a bearing on the subject. You might as well read it. Go right on where you stopped.

Mr. Cathcart: All right. Page 10, line 15. (Reading.)

“Q. As joint owners, and you were using it?

“A. That's right.

“Q. And the money you got from that job went into the partnership? “A. That's right.

“Q. Now, do you recall driving south of Scotia toward this bridge? “A. I do, yes.

“Q. Do you remember this quite well?

“A. I do.

(Testimony of Allan J. Warner.)

“Q. By the way, you stopped at Scotia and serviced your truck? “A. That’s right.

“Q. You put air in the tires, is that right?”

I don’t believe that this deals with the subject that I intended to bring out.

Mr. Gray: O.K.

Mr. Cathcart: Q. Now, Mr. Warner, I call your attention to a copy of the transcript of your testimony before Judge Goodman and I believe you read part of this, you read page 6, lines 3 to 12. Mr. Gray asked you if you had given answers [136] to his questions, and then he read that testimony to the jury. Now would you read the rest of that page, down through page 7, line 1? (Handing to the witness.)

Mr. Gray: Where did he start, counsel?

Mr. Cathcart: Where you left off.

Mr. Gray: Now I was on page 6.

Mr. Cathcart: I asked him to read from there down to page 7, line 1.

(The witness examined a copy of the transcript referred to above.)

Mr. Gray: Counsel, I think Mr. Warner has finished.

Mr. Cathcart: Have you finished it? I am sorry, Mr. Warner.

Q. And do you recall if those questions were asked you by Mr. Bledsoe when you were before Judge Goodman in this matter and did you give those answers? A. I believe I did.

Mr. Cathcart: Yes. And then I will just, so

(Testimony of Allan J. Warner.)

that we can get a little better continuity, repeat the part that Mr. Gray read. This was a question by Mr. Bledsoe to this gentleman when he was testifying before Judge Goodman in this part here. In fact, it was in this room: (Reading.)

“Q. This trip was in the nature of a vacation trip for you, wasn’t it?

“A. It was a combination. [137]

“Q. What was the nature of the combination?

“A. Business had been very slow about that time of the year and we had gone up into Willow Creek for an outfit up there, California Barrel. We had intended, if possible, to haul barrels out of Willow Creek.

“Q. Did you see someone while you were up there about that? “A. No, I didn’t.

“Q. How long did you stay up there?”

This is the part that was read yesterday, that I just wanted to read so that you could get the entire picture of the thing. (Continuing.)

“Q. How long did you stay up there?

“A. I was up there about two weeks, I believe.

“Q. And was this during your vacation time?

“A. Yes, sir.

“Q. Then on the way back, did you do anything but just drive home?

“A. No, not at all.

“Q. And the purpose was simply to get home?

“A. That’s right.

“Q. You were not transporting any commercial goods at that time? “A. No, I wasn’t.”

(Testimony of Allan J. Warner.)

The Court: Was he speaking of the final return home? [138]

Mr. Cathcart: Well, he is being asked about the accident trip.

The Court: Oh, the accident trip. All right.

Mr. Cathcart: Yes, sir.

The Court: I just wanted to make sure. All right.

Mr. Cathcart: Q. And I will also ask you to read page 5, line 7, down to page 6, line 2, just to get the whole story here. (Handing to witness.)

Mr. Gray: Counsel, while the witness is reading that, will you stipulate that this transcript that you are now showing him was a default proceeding conducted by Mr. Bledsoe, of your office, in which I was not present, nor did I participate. Will you so stipulate?

Mr. Cathcart: Surely.

Mr. Gray: Thank you.

Mr. Cathcart: I assume that what you have stipulated was a fair proceeding, conducted before Judge Goodman who was known for fairness?

Mr. Gray: I will stipulate to the fairness of Judge Goodman any day, today included.

The Court: All right, now that all the amenities have been provided for, taken care of, let's go on, gentlemen.

Mr. Cathcart: Now the additional material that I wanted to read was simply this: (Reading.) [139]

“Q. That accident occurred on Highway 101 in

(Testimony of Allan J. Warner.)

the County of Humboldt, three miles south of the city of Scotia, is that right?

"A. That's right.

"Q. At the time of the accident were you driving a 1939 Dodge Truck, number 8702218, is that right? "A. That's right.

"Q. And that tractor had no trailer or anything behind it at that time? "A. Also right.

"Q. And accompanying you on your trip was your wife and some child or children?

"A. No, I was with my wife only.

"Q. The trip had been taken to what town?

"A. Willow, Willow Creek.

"Q. You were taking your mother-in-law or mother up there? "A. My mother.

"Q. Was your wife along?

"A. Yes, on the way home.

"Q. Oh, on your way home, your wife was coming back with you? "A. That's right." [140]

Mr. Cathcart: Well, perhaps counsel is willing to stipulate to this. That same exhibit, if your Honor please, to the answer, we have set forth a copy of a reservation of rights agreement under which this gentleman was defended by our firm in the State Court, and I take it counsel has no objection to stipulating it was executed?

Mr. Gray: I will stipulate to its authenticity, your Honor; if counsel states it was signed, it is good enough for me. But I do not stipulate to its admissability. [141]

* * * *

(Testimony of Allan J. Warner.)

The Court: Yes; well, if counsel will not accept the stipulation, I think I will overrule the objection and have it introduced as an exhibit so that the jury may, if they desire, examine it, and satisfy themselves of the terms. [142]

* * * *

The Clerk: Defendant's exhibit A in evidence.

DEFENDANT'S EXHIBIT A

Leighton M. Bledsoe, Law Offices of Cooley, Crowley, Gaither & Dana, 206 Sansome Street, San Francisco 4; DOuglas 7828.

San Francisco, California
August 26, 1946

Commercial Standard Insurance Co.
Fort Worth, Texas
c/o Cooley, Crowley, Gaither & Dana
206 Sansome Street
San Francisco, California

Re: George W. Boulter and Margretta Boulter v. Allan J. Warner, Robert W. Woodrow, et al.—San Francisco Superior Court No. 356235, Comm. Stand. Ins. Pol. No. MC 170330.

Gentlemen:

This is to advise you that we, and each of us, agree that you, and any of your representatives and attorneys, may participate in any investigation and/or defense of the above mentioned claim by George W. Boulter and Margretta Boulter, and of

(Testimony of Allan J. Warner.)

that certain action numbered 356235 in the Superior Court of the State of California in and for the City and County of San Francisco brought by said Boulders against us; and that any such action taken or to be taken by you, or any of your representatives, is entirely without prejudice to any rights and defenses of the Commercial Standard Insurance Company under the above described, and any, insurance contract; and any such participation does not and shall not constitute an admission of liability on the part of said Commercial Standard Insurance Company.

It is likewise understood by us, and each of us, that nothing herein contained shall prejudice the right of either the Commercial Standard Insurance Company or of the undersigned to apply to any court of competent jurisdiction at any time for a determination of the rights of the parties with respect to said or any, contract of insurance.

We do, and each of us hereby does, waive any right that we, or either of us, may have to claim that the Commercial Standard Insurance Company waives, has waived, or shall waive any right to deny liability under said, and any, contract of insurance. At the same time, we in no way waive any of our rights against the Commercial Standard Insurance Company under said contract.

Very truly your,

/s/ ALLEN J. WARNER,

/s/ ROBERT W. WOODROW.

The Court: All right.

(Testimony of Allan J. Warner.)

* * * *

Mr. Cathcart: Q. You told us yesterday that at that time you made your statement to the insurance company about what happened, and at that time, you didn't mention any of this carrying pipe and furniture and that sort of thing—it just hadn't occurred to you, or you didn't think it was pertinent, is that correct? [143]

A. That's correct.

Q. And in your discussion with Mr. Gray yesterday afternoon, just what was the tenor of that discussion yesterday afternoon, do you remember? Did he suggest that perhaps there were some things that you hadn't thought of or just how did that come up?

A. No, I don't know just exactly how it came out.

Q. Do you remember how long he and you talked? A. About ten minutes, I imagine.

Q. About ten minutes. And you talked about the things you talked about this morning on the stand, is that correct?

A. Whatever has been discussed here.

Q. I see. Do you recall when you were paid the \$75 by your sister for carrying this pipe up there?

A. Do you mean the day before or the day after, or when I was paid?

The Court: Well, when, if at all, before you returned to San Francisco and after you got there.

The Witness: I was paid the night before I left.

(Testimony of Allan J. Warner.)

The Court: All right, the night before you left. All right.

Mr. Cathcart: Q. You were paid the night you left? A. That's right.

Q. And how much did you receive?

A. \$75. [144]

Q. In what form of money?

A. Traveller's check.

Q. A traveller's check? A. That's right.

Q. What kind of a traveller's check? If you remember.

A. I don't know, just a traveller's check.

Q. I see. And it was endorsed by whom?

A. By my sister.

Q. And did you cash it? A. Yes, I did.

Q. Where?

A. At a service station I do business with.

Q. In San Francisco? A. Yes, sir.

Q. I see. And you paid that, I believe you said, as a premium on your insurance? A. I did.

Q. When?

A. On the following Monday, I believe.

Q. On the following Monday? A. Yes.

Q. That is the Monday following this accident?

A. That's right.

Q. Then what day was the accident?

A. Saturday. [145]

Q. And I believe you said you went back to Scotia to have some temporary repairs done on your tractor, is that right? A. That's right.

Q. And when did you leave Scotia?

(Testimony of Allan J. Warner.)

A. The evening of the accident.

Q. That would be Saturday evening?

A. Saturday, afternoon, late.

Q. And then you got to San Francisco early Sunday morning?

A. No, sir, I got to San Francisco—it was about 11 o'clock.

Q. Eleven o'clock at night? A. Yes.

Q. And—

The Court: Please don't repeat the answer. We all fall into that habit. It is confusing; unless the reporter knows your habits, he will put it down as another answer, and it is confusing in the record.

Mr. Cathcart: Well I am sorry, your Honor.

Mr. Cathcart: Q. When did you see the insurance company then? A. Monday morning.

Q. Did you pay the premium at that time?

A. I did.

Q. How much was it, do you remember?

A. \$33.

Q. \$33? [146] A. That's right.

Q. Was that the regular premium or was that what it was always? Do you know how it happened to be \$33? A. No, I don't.

Q. Did you answer the question?

A. Yes, I did. I don't know.

Q. You don't know how it happened to be \$33?

A. No, I don't.

Q. You told us yesterday, that your purpose, I believe, in carrying this pipe was to get money for your insurance policy, is that correct?

(Testimony of Allan J. Warner.)

A. That's right.

Q. Were you at this Blue Lake area about a week before returning to San Francisco or about two weeks?

A. I don't know now. It was too long ago.

Q. When did you receive \$75, just after you got there?

A. No, the night before I left for San Francisco.

Q. Oh, I see, not until you were ready to leave?

A. That's right.

Q. Was that for all the work you did or just for the carriage of this freight?

A. That was for the carriage of the freight.

Q. What time of day, do you recall, were you paid off? A. About nine o'clock at night.

Q. Nine o'clock. And what night would that be?

A. I don't remember.

Q. I see. But at any rate, just before you left for San Francisco? A. That's right.

Q. I believe you testified you left for San Francisco about 5:00 o'clock in the morning.

A. That's right.

Q. Yes. Now just exactly where was this job of fixing the pipe done, was that in Willow Creek? Now we have talked about different places, so could you fix in your mind and tell us just where that was?

A. No, I don't think I can, to be truthful with you.

Q. Well, was it on a farm somewhere?

(Testimony of Allan J. Warner.)

A. It was in a little mining—well, it was on a piece of mining property.

Q. That is where your sister's home is?

A. That's right.

Q. I see. And is it near Willow Creek or near Eureka or near Blue Lake?

A. No, it is—I believe it is in Willow Creek, and as I understand it, it is on the south fork.

Q. I see. And what kind of a community is Willow Creek, is it a large community or a very small one? A. It is very small.

Q. And what about Blue Lake, is that a small community also? [148] A. It is.

Q. I suppose Eureka is a pretty good sized town? A. It is.

Q. Now this testimony that you gave a few minutes ago about having it in your mind to see Mr. Dowdell when you came down on this trip, did you have that in mind when you left on the first trip south?

Mr. Gray: I don't quite understand that—the first trip south, counsel?

Mr. Cathcart: Q. The trip on which the accident happened? A. I did.

Q. When did that first enter your mind?

A. Well, it was my intentions when I went up there; I had my work.

Q. That is when you left San Francisco?

A. That's right.

Q. You intended to return from Eureka to see Mr. Dowdell in San Jose? A. That's correct.

(Testimony of Allan J. Warner.)

Q. And when you left San Francisco, you had your trailer on and you intended, did you not, to go up to Eureka, to that area, and unload your trailer and then bring it back? A. I did.

Q. And you intended, after bringing your tractor and the trailer back to San Francisco, to go to San Jose and see if [149] Mr. Dowdell had some hauling you could do for him, is that right?

A. Yes.

Q. I suppose Mr. Dowdell is a man you have done a good deal of business with in the past?

A. I have.

Q. And you kind of always had that intention, of getting another job from Mr. Dowdell?

A. No, I worked for him regularly.

Q. You worked for him regularly?

A. I worked for him regularly?

Q. I see. So that you didn't really have to get in touch with him beforehand? A. Yes, I did.

Q. You would phone him up from San Francisco, would you? A. Not necessarily.

Q. Sometimes you would go right down and see him? A. That's right.

Q. But other times you would call him from San Francisco and ask him about a hauling job?

A. That's right.

Q. So that you always regularly worked for him, and your state of mind on this trip was really no different from what your state of mind was at any other time? A. Yes, it was. [150]

Q. It was—in what way?

(Testimony of Allan J. Warner.)

A. Well the fruit starts to move about that time of year.

Q. I see. And how long have you been in this trucking business?

A. I have been in it all my life.

Q. Well that happens every year, then, doesn't it, that the fruit starts to move about that time of year?

A. That's right.

Q. So that your state of mind wouldn't be any different from what it would be any year at that time of year?

A. Yes, it was.

Q. In what way?

A. That was a poor season for the fruit.

Q. Well, nevertheless, did Mr. Dowdell haul fruit?

A. Mr. Dowdell hauls fruit.

Q. But even though it was a poor season, you expected to go down and see if you could haul fruit?

A. Yes, and see him if possible.

Q. So that your intention was fundamentally one of hauling fruit for Mr. Dowdell at this time of year?

A. Or somebody else.

Q. Surely, and that was always your intention at that time of year?

A. Yes, that's right.

Q. So that there was nothing peculiar about this trip from [151] Eureka down to San Francisco which was tied up with your intention of seeing Mr. Dowdell about hauling fruit for him at that time of year?

A. That's right.

Mr. Cathcart: I think that is all, your Honor.

Mr. Gray: Just one question here.

(Testimony of Allan J. Warner.)

Re-Cross Examination

Mr. Gray: Q. Counsel questioned you about this premium of 33. Is that the monthly premium?

A. (Witness hesitated.)

Q. Well it wasn't the yearly premium, was it?

A. No, it wasn't; I believe it is a monthly premium. I am not positive, though.

Mr. Gray: Is that right, counsel?

Mr. Cathcart: It is on the policy.

Mr. Gray: Monthly premium, yes. All right.

Mr. Gray: That is all.

The Court: Just one question I would like to ask.

Q. Tell, me, why is it that on previous occasions—I think I asked you this yesterday and I will ask you again in view of the fact that you have amplified the story you told yesterday. Why is it that in some of these proceedings when you were before Judge Deasy and when you were before Judge Goodman, you never said anything about any contract, about hauling pipe, and being paid for it, but talked only about going on vacation? [152] Why is it that you admitted that fact?

A. Well there are just things that seem to me that— (Hesitating)

Q. Well my hearing is perfect; just look at the jury.

A. (Continuing) They seemed not important. After having time to think about them, and thinking about other things, well, I guess they did seem important.

(Testimony of Allan J. Warner.)

The Court: I see.

Mr. Gray: May I ask a question on that?

The Court: Yes.

Mr. Gray. Q. You had quite a number, or some conversations with insurance adjusters of this company on the subject, too, didn't you, before you went to Judge Deasy? A. I did.

Q. And do you remember whether you told them about the pipe or not? Did they tell you not to mention pipe?

A. No, they didn't, as far as I can remember.

Q. Do you know whether you told them about the pipe? A. I don't remember.

Q. Well, did you tell them all the facts as you then remembered them?

A. In the statement, sir, everything that I said—the questions were asked me, and to the best of my knowledge as they were asked, I would answer them. [153]

Q. All right, let me ask you this question, then: Did the insurance adjuster ask you whether you were carrying any cargo? A. No, he didn't.

Q. He didn't? A. Not as far I know.

Mr. Gray: I see. That is all.

The Court: Q. So far as you know, when was the first time that you mentioned to anybody, whether in court or out of court, the fact that you were not only on vacation, but were also carrying a load of pipe when you went up?

A. I couldn't answer that.

Q. You couldn't answer that. By the way, you

(Testimony of Allan J. Warner.)

said that you made a report of the accident. What do you mean, that you reported it to the insurance company or the official report that you are required to make under the Motor Vehicle Act whenever you have an accident involving property?

A. The California Highway Patrol was at the accident. He took all the notes of the accident.

Q. He took all the notes? A. Yes.

Q. And you signed those notes, or signed a statement?

A. There was no statements, no citations of any kind.

Q. Well that isn't the point. You are required, you know, under the law, that whenever you are in an accident which [154] involved damage to property, even if you run against a parked automobile, you are supposed to make a report?

A. That's right.

Q. You had to state to the Motor Vehicle Department all about it. Now of course if there is an officer there who takes your statement, you don't need to make a report. That is your report. Is that what you mean?

A. That is what I mean. I notified my insurance company.

Q. All right, when you talked to the officers, did you tell them about the trip at all, do you remember? How you happened to be going back?

A. No, sir, I don't believe I did.

Q. Well when you saw the insurance company after you came to San Francisco, did you tell them

(Testimony of Allan J. Warner.)

about the trip and the details that you have given us now? That is, that you went on vacation and that you also made it a combination trip?

A. I believe that is the way I gave it—as a combination trip—business and pleasure. I am not positive.

Q. You are not positive? A. No.

Mr. Gray: Well let me ask just this question:

Q. You did testify, of course, before Judge Deasy, about the pipe, you remember that?

A. I believe so.

Q. You told me that here today. [155]

A. Yes, yes.

Q. Now at the time you testified here before Judge Deasy, that was the file of the action which the Boulters were suing for damages and got a judgment which we have talked about, is that right? A. I believe it is.

Q. That is the file for that action, no question about that. And in that file I was representing the Boulters—you remember that? And Rogers Smith of Dana, Bledsoe, and Smith, of which Mr. Cathcart is a member, was representing you and your partner—what is his name?

A. Woodrow.

Q. Yes, Woodrow. You remember that you were examined by Mr. Smith on direct examination about the case, is that right?

A. That's right.

Q. Now in my cross-examination, you told me about the pipe and we read it here, is that right?

(Testimony of Allan J. Warner.)

A. That's right.

Q. Now up to the time—

Mr. Cathcart: Excuse me, you examined him under 2055, without having first been examined by Mr. Smith.

Mr. Gray: Well, Smith examined him later, but I examined him under cross-examination.

The Court: All right, the main point is whether it was brought out at that time, and how it was brought out is not [156] important.

Mr. Gray: Q. Now before you testified at that trial, did Mr. Smith, your attorney, go over the facts with you, or discuss them with you?

A. Yes, he did.

Q. He discussed the facts with you?

A. Yes.

Q. And when you discussed the facts with your attorney, Mr. Smith, did he ask you why you were going, and did you tell him about the pipe?

A. I don't remember.

Q. You don't remember. But you do know you discussed the facts? A. Yes.

Q. As far as you know now, did you tell him the truth—Mr. Smith? A. Yes, I did.

Q. You told the truth to him, you didn't hold anything back that you know of? A. No, sir.

Q. All right, now at the time that I cross-examined you in that case, when I was representing the Boulters in this damage action, had you ever seen me before? A. No, sir.

Q. In your life? [157] A. No.

(Testimony of Allan J. Warner.)

Q. Have you ever talked to me over the telephone? A. Not that I know of.

Q. Did you ever talk to anybody that purported to be a representative of me or the Boulters before that? A. No, I never did.

Q. So you were there defending yourself in that case, is that right? A. Yes, that's right.

Mr. Gray: That is all.

Further Redirect Examination

Mr. Cathcart:

Q. Now on your report to the insurance company, you gave that about June 24th, 1946, didn't you? That would be, I believe, two days after this accident? A. That's right.

Q. And you talked to some adjuster for the insurance company? A. That's right.

Q. And you told him all of the facts?

A. That's right.

Q. And did they write down more or less what you told them?

A. Yes, they asked me questions, or he asked me questions, and to the best of my knowledge, I would answer them.

Q. Surely. And did he prepare a statement?

A. He did. [158]

Q. For you to sign? A. Yes, he did.

Q. And you, of course, read the statement over and signed it, is that right? A. I did.

Q. And I ask you if this is that statement. This is an exhibit in the proceedings before Judge Good-

(Testimony of Allan J. Warner.)

man. Look it over at your leisure and tell us if that is your statement. (Handing to witness.)

A. Well—(Hesitating)

The Court: Well, you don't need to read it word for word, just look it over. You are reading it word for word. Just see whether you signed it.

Mr. Cathcart: Q. And is that your signature on that statement? A. It is.

Q. And you signed at the bottom of each page, did you not? A. I did.

Q. And you read the statement over before signing it, is that correct? A. I did.

Mr. Cathcart: I will now offer this statement in evidence, if your Honor please, and I want to call particular attention—

The Court: Just a minute, let's give it a number first, before you read any part of it. [159]

Mr. Cathcart: Yes.

The Court: This is a part of another file, so we will receive it by reference.

Mr. Cathcart: It is a statement dated June 24, 1946.

The Clerk: Defendant's Exhibit *C* in evidence.

(Statement referred to above was then received in evidence as Defendant's Exhibit *C*.)

(Testimony of Allan J. Warner.)

DEFENDANT'S EXHIBIT B

San Francisco, Calif.

June 24, 1946

My name is Allen J. Warner age thirty (30) married and live at No. 10 Ord Court, San Francisco, Calif with my wife June age twenty seven (27) and my minor son Richard. I am engaged in the trucking business with Robert W. Woodrow age twenty nine (29) of 1500-Cole Street, San Francisco. We are the co-owners of a 1939 Dodge tractor motor number T78-1665 Serial No. 8702218 and a 1938 Doane Trailer Model No. 115. I have a drivers license and chauffeurs license No. R904798 and No. 423118 respectively current and restricted to wearing adequate glasses. On Saturday June twenty second (22) at about one thirty (1.30) PM I was involved in an accident while operating the above described equipment. My wife June was riding in the cab with me at the time. The accident occurred about two (2) miles south of Scotia, Calif on Highway No. 101). I had no cargo at the time. I was returning from Willow Creek, Calif. I had taken my mother and son there to visit my sister at Willow Creek. On the return trip I was driving south on No. 101 a two lane, paved highway in the right hand lane of travel. I had been going about forty (40) miles per hour. About two (2) miles south of Scotia I was rounding a slight curve angling to the right and as I approached the steel truss bridge at this point I

(Testimony of Allan J. Warner.)

cut my speed to thirty (30) MPH. Then I saw a north bound car approaching on the bridge. There is an expansion joint on either side of the bridge where it joins the highway. These joints are about two (2) feet wide and there is a slight hump to them. It seems they are constructed of planks below and paved over with asphalt. As I drove on the bridge at a slight angle due to the curve in the road the front wheels of my truck left the pavement completely then bounced to the left across the white line and directly in the path of the on-coming or north bound car. We collided just about head on about five feet (5) south of the north bridge approach. The impact pushed the struck car back about five (5) feet. At the time of the impact my left front wheel was over or left of the white line thirty three (33) inches according to measurements taken later by the highway patrol. After the accident I got out of my cab went over to the left door of the struck car which I had trouble in getting open and assisted the driver out. He appeared dazed and started to walk away. I got ahold of him and had him sit down on the left side of his car, then assisted the other occupant a lady out of the car. Her face and head were bleeding and her right leg appeared to be badly injured. She was unconscious when I lifted her from the car. By that time another car approached and I got a blanket and a pillow from the occupant then wrapped the lady in the blanket and put her at the road side. I then requested the driver of

(Testimony of Allan J. Warner.)

another car that then approached the scene to go back to Scotia to notify the Highway Patrol and secure an ambulance. At the scene I learned the injured were Mr. and Mrs. Geo. W. Bolters both about thirty (30) years of age and that he could be reached at the Olympic Hotel at Seattle, Washington. Both were taken to the Scotia Hospital by ambulance that arrived about twenty (20) minutes after the accident. The highway patrol (one officer) made a detailed investigation at the scene. He said my left rear dual wheels skidded twenty seven (27) feet prior to the impact and that the left front wheel of my truck was thirty three (33) inches to the left of the white line. The officer told me that towns people tried several times to have that bridge condemned because of its narrowness. No citations were issued. The tow truck then arrived and towed the struck car to the Scotia Garage. It was either a Buick or Oldsmobile of late model and a coach I believe. My tractor also was towed to the same garage. I then went to the hospital and talked to Mr. Bolters. He said he saw me approach the bridge from about a half block distance and that he was going about thirty (30) MPH and estimated my speed about the same. He said also he was a field engineer for the Chuisse Pump Company of San Francisco and that he was transferred to Seattle and was on his way to his new headquarters. I also saw his wife at the hospital after the leg (right) was placed in a cast. It seems the foot was broken below the ankle. I

(Testimony of Allan J. Warner.)

then had emergency repairs made to my tractor and I drove it back to San Francisco. I nor my wife had any intoxicating liquor to drink prior to the accident and I don't believe the occupants of the other car had been drinking. The weather at the time was clear and dry. I read this statement of four and one half pages (4½). I understand it and it is true.

(s) ALLEN J. WARNER.

The Court: I may state to the jury a fact which I am sure you are familiar with, and that is that any of these documents which are introduced in evidence, you are entitled to have sent out to you if you so desire. You just call for the exhibits, and all of them will be sent to you so that you can examine them. Counsel may not wish to take time to read it all, or read them all to you, because they are interested in only certain portions, but you have a right to see the document and read it in its entirety, because it is part of the record of the case. All you do is to ask for the exhibits, after you retire to the jury room.

Mr. Cathcart: Now the statement reads in part—this has been admitted in evidence, your Honor?

The Court: Yes, it has been received.

Mr. Cathcart: Q. This statement is the report of the accident that you made to your insurance company, isn't it? A. That's right.

Q. And it reads in part, and of course Mr. Gray can go to any [160] other parts of it that are pertinent: (Reading)

(Testimony of Allan J. Warner.)

“ . . . The accident occurred about two (2) miles south of Scotia, Calif., on Highway No. 101. I had no cargo at the time. I was returning from Willow Creek, Calif. I had taken my mother and son there to visit my sister at Willow Creek. On the return trip I was driving south on No. 101, a two lane paved highway, in the right hand lane of travel.”

And then it goes into the facts of the accident.

Mr. Cathcart: Q. Now is that the report that you gave the insurance company?

A. That's right.

Q. Yes. And now—

Mr. Gray: May I have that?

Mr. Cathcart: Surely.

Q. Now these other matters that you recalled, after you gave the first reports—that is, this report of course, we have just read, and it doesn't refer to any cargo of any kind, to any functions of that kind on your trip north. Now when did it first occur to you that those things were important?

A. Well after talking to truck owners.

Q. What did truck owners say?

A. The truck owners told me that I should have mentioned my cargo.

Q. So after that, you did? [161]

A. After that, I did.

Q. Well now, you talked about—

The Court: Just a moment, let me ask you this:

Q. Did they tell you why?

A. No, they didn't tell me why.

(Testimony of Allan J. Warner.)

Q. They didn't tell you why at all?

A. No, they didn't.

Q. Well, I suppose you thought you were covered right up until when?

A. Right up until I wasn't.

Q. When what?

A. Well, I don't know just exactly when.

Mr. Cathcart: Q. Well, did you ever get any communication from Mr. Gray which suggested that there might be some question about coverage?

A. No, I don't think so.

Q. Well, I will show you a copy of a letter received by our office, dated December 4, 1946, on the stationery of Mr. Gray, addressed to you and Robert Woodrow, with copies to our office. I may say that the copies indicated were sent to Cooley, Crowely, Gaither & Dana, our predecessors in this representation.

Mr. Gray: Counsel, I will stipulate that you may put that entire letter into evidence, and that it was duly mailed to Warner and Woodrow.

Mr. Cathcart: All right. [162]

Mr. Gray: And I will stipulate that you may put the letter in evidence.

The Court: However, as to that stipulation, the question which Mr. Cathcart is asking is as to whether the original was received by this witness. If you can cover that by stipulation, then it will be complete.

Mr. Gray: Well of course he isn't my witness, and I don't know. You can ask him.

(Testimony of Allan J. Warner.)

The Court: But you wrote him the letter.

Mr. Gray: I wrote the letter, and it was put in the mail, and there was a stamp on it. So he should have received it.

The Court: All right, ask him.

Mr. Cathcart: Q. Did you receive this letter?
(Indicating)

The Court: You mean the original of this letter, of course.

(Document handed to witness.)

A. I heard something about this, but I have never seen it myself.

Q. You heard something about this letter. Well, whom did you hear about this letter from?

A. I believe from my mother.

Q. Well, did she tell you that the letter had arrived?
A. Yes.

Q. And I suppose she told you what was in it, more or less?
A. No, she didn't. [163]

Q. What did you say?

A. I believe the letter is still unopened at home.

Q. The letter from Mr. Gray addressed to you is still unopened?

A. That's right. I believe it is.

The Court: All right.

Mr. Cathcart: Q. Well, would it be there today, do you suppose?

A. I don't know whether it would or not. I was out of town at that particular time, when the letter arrived. I had been out of town for about two months and when I came back, I figured it was of

(Testimony of Allan J. Warner.)

no importance then, it wouldn't have done any good anyway.

Q. Well it was dated December 4, 1946; do you recall when you received it, or when you first saw it or first heard of it?

A. About two months later.

Q. You first heard of it around February of 1947, is that correct? A. I don't know.

Q. Well what did your mother say, that there was a letter for you from Mr. Gray?

A. That there was a letter from Mr. Gray, yes. But as I understood it, I was to get in touch with Mr.—with my insurance company, the way I have always understood it. I understood that I was to get in touch with my insurance company, [164] and they were to handle all matters of any paper or letters or anything like that coming from another attorney.

Q. I see. Did you send it to your insurance company? A. I don't believe I did.

Q. And you did not open it?

A. No, I didn't.

Q. And as far as you know, it is there to this day? A. I imagine it is.

Mr. Cathcart: Well, if your Honor please, we will offer this letter in evidence and let the jury determine whether or not this witness, perhaps, read it and closed it up and forgot about it. I mean, I am not suggesting any bad faith.

Mr. Gray: No objection to the letter going in evidence.

(Testimony of Allan J. Warner.)

The Court: All right, it may be received.

The Clerk: Defendant's Exhibit C in evidence.

(The letter was received and marked Defendant's Exhibit C.)

DEFENDANT'S EXHIBIT C

(Copy) Nathan G. Gray
Attorney At Law
American Trust Building
Berkeley 4, California
BERkeley 6161

December 4, 1946

Messrs. Allen J. Warner
and Robert W. Woodrow
10 Ord Court
San Francisco, Calif.

Gentlemen:

I have received a copy of a complaint from which it appears than an action has been commenced against you by Commercial Standard Insurance Company in the United States District Court for the Northern District of California, Southern Division. My clients, George W. Boulter and Margretta L. Boulter, are also named as defendants in this action.

Normally it is improper for an attorney to address a communication to the adverse parties when they are represented by attorneys as you are. However, this is not a normal case, in that while you

(Testimony of Allan J. Warner.)

are adverse parties in the case brought against you by George W. Boulter and Margretta L. Boulter in the Superior Court in San Francisco, there is a unity of interest between us in the action brought in the United States District Court. To make the situation more anomalous, you are being defended in our action in the Superior Court by the same firm that is suing you in the United States District Court, and both matters pertain substantially to the same subject matter.

In other words, insofar as the United States District Court action is concerned, it is to our advantage for you to prevail, in that it makes available money for the settlement of any judgment that we may be accorded in the Superior Court, whereas from your standpoint it relieves you from the expense of defending the action and paying the judgment against you if one is obtained, in an amount not exceeding the limits of your insurance policy.

My reason for taking the liberty to write to you and explain this matter is merely in the hope that it will result in your taking proper steps to defend this action, and if you have already placed this District Court matter in the hands of an attorney, it would be greatly appreciated if you would turn this letter over to him with the request that he communicate with me.

Very truly yours,

NATHAN G. GRAY,

NGG:FLR

(Testimony of Allan J. Warner.)

CC: Messrs. Cooley, Crowley, Gaither & Dana, Attorneys at Law, 206 Sansome Street, San Francisco, California.

Mr. Cathcart: Q. Well, you finally did hear that there was some pretty grave question about whether you were covered in this accident, didn't you? A. That's right.

Q. Do you remember when it was first brought to your attention, when you first heard that?

A. No, I don't; I haven't the least idea.

Q. Well would it be several months after the accident happened? The accident happened on June 22nd, 1946, and there was an action [165] filed in August, 1946. That is when the Boulters sued you. That is in the answer here. And that finally didn't get to trial until almost a year later, October 27, 1947. Had you heard about it up to that time?

A. I don't know.

Q. You don't know?

A. No, I don't know.

Q. Well, do you recall when you testified before Judge Goodman? A. No, I don't.

Q. Well, all right. But it was after you heard that there was a possibility of there being no coverage that you realized the importance of your activity on that trip, is that correct?

A. That's correct.

Q. And that was after the truck drivers had talked to you? A. That's right.

Q. All right, I see.

Mr. Cathcart: I think that is all.

Mr. Gray: All right, Mr. Warner.

(Witness excused.)

Mr. Gray: Before I forget it, your Honor, I would like to offer in evidence Mr. Warner's testimony before Judge Deasy, as long as the witness has testified about it, and as long as we have the testimony before Judge Goodman. May that be in evidence?

The Court: I beg your pardon? [166]

Mr. Gray: May I offer in evidence the transcript of the testimony of Mr. Warner before Judge Deasy?

The Court: With a jury case, we can't receive it, because we don't send the transcript in. You will have to read what you want.

Mr. Gray: Well I mean, I will read it here.

The Court: Well, the only thing is that we never do that—we never send a transcript of testimony out to the jury.

Mr. Gray: Well, you just put the transcript of Judge Goodman's proceedings, the testimony in; I want to do the same thing.

The Court: No, it was read.

Mr. Cathcart: Just a part of it was read.

The Court: Yes, a portion of it was read. The only way you can do that with a jury is to read it, or, you could give it a mark of identification, and then the portions you want, you can read, because we don't send the transcripts out to the jury. I am sure that is the rule here. It is the rule of California.

Mr. Gray: Could we take out that portion that refers to this matter?

The Court: No, no testimony is ever sent out to a jury. I am sure that is the rule here, gentlemen, because I have been practising law in California for a long time. I don't [167] want to give away my age, but it would be nearly 40 years, and 21 have been as a judge. I don't know of any rule that allows testimony to be given to the jury. In fact, we have a rule that if the jury desires to hear part of the testimony, we read from the transcript to them ourself. I spent four hours with a jury one Sunday reading a testimony. I preferred to read it myself.

Mr. Gray: Well, it wasn't intended as testimony, it was just as prior contradictory statement, and I wanted to show—

The Court: Well, then, you read it to them—read it to the jury and I will have the Clerk identify it as an Exhibit. He will be in in a minute. I am sorry, gentlemen, I mislaid some instructions. The secretary says she wrote them up and I can't find them.

Mr. Gray: I will read all that is relevant.

The Court: Are you through with him?

Mr. Gray: No, there are some questions I want to ask him.

The Court: All right, have him step down. He might be more comfortable.

Mr. Gray: Do you mind staying there?

Mr. Warner: I don't care.

Mr. Gray: All right.

The Court: You go ahead?

Mr. Cathcart: What are you reading now, counsel? [168]

Mr. Gray: Wait until I find it.

I just didn't want to have the jury take part of the record with them and not the rest of it.

The Court: I would prefer that you read it into the record. I don't want the jurors to begin arguing about testimony. We don't do that.

Mr. Gray: All right, I will start at the bottom of page 4, line 21, counsel.

Mr. Cathcart: Now excuse me, I want to get on the track of it here. I want to make an objection to any part of this testimony in the Superior Court action that hasn't any bearing on the issues here.

Mr. Gray: Well, I am trying to confine it to the nature of the trip and so forth. If you want to make a suggestion as to where I should start, I will follow your suggestion.

The Court: Well we are interested only in the purpose of the trip.

Mr. Gray: That's right. Well I am trying to do that. I am starting, I think, at a logical point. If I am wrong, why you correct me, counsel. (Reading.)

"Q. Mr. Warner, I call your attention to June 22, 1946, Where did you reside then?

"A. I resided—you mean my residence?

"Q. Yes.

"A. I live at number 10 Ord Street. [169]

"Q. In San Francisco? A. That's right.

“Q. What was your business on that day?

“A. I was in the transportation business.

“Q. What was the name of that business?

“A. It had no name.

“Q. Who was the owner of the business.

“A. My partner and myself.

“Q. And what was your partner’s name?

“A. Mr. Robert W. Woodrow.

“Q. And what is his address?

“Mr. Smith: At the present time?

“Mr. Gray: Yes, now, if you know?

“A. I don’t know.

“Mr. Gray: Q. What was his address on that day?

“A. I am not positive about it. It was on Cole Street. It is Cole and—I am not sure.

“Q. All right. What was your place of business?

“A. We operated out of number 10 Ord Street.

“Q. At your residence? A. That’s right.

“Q. And you say your business was the transportation business? A. That’s right.

“Q. What were you transporting? [170]

“A. General freight of all types, everywhere.

“Q. For hire? A. That’s right.

“Q. You would haul anything for a certain stipulated rate? A. That’s right.

“Q. And how many trucks or pieces of equipment did you have?

“A. At one time or at that time?

“Q. At that time? A. One.

“Q. And was that the vehicle involved in this accident? A. That is the one.

"Q. Well, now, what was Mr. Woodrow's work in connection with this partnership?

"A. About the same as mine.

"Q. He would drive the truck or tractor the same as you would? A. That's right.

"Q. And you were partners with each other?

"A. That's right.

"Q. What was the type of equipment?

"A. It was a 1939 Dodge 2½ ton tractor.

"Q. And was that the device that is used to hook a trailer onto? [171]

"A. That's right. It was what is known as a tractor-trailer combination.

"Q. And did you at that time have a trailer to go onto it?

"A. I had a trailer to go onto it at Eureka that belonged onto it.

"Q. To be put on there? A. That's right.

"Q. Now, calling your attention to the date of the accident, June 22, 1946, you were driving this Dodge truck, is that correct?

"A. That's right.

"Q. In what direction were you going?

"A. I was headed south.

"Q. And where had you been?

"A. I had been to Blue Lake.

"Q. And that is in Lake County, is it?

"A. That is in Lake County."

We know that is not correct.

"Q. Had you left what you call the device in the back of the trailer? A. The trailer.

"Q. Had you transferred the trailer up there?

“A. I had taken the trailer up with a load of pipe.

“Q. Where had you taken it?

“A. To Blue Lake. [172]

“Q. From where?

“A. From San Francisco.

“Q. From what company?

“A. For no company, for a relative that had a summer home up there.

“Q. You transported pipe for a relative?

“A. That's right.

“Q. Were you ever paid for it?

“A. Yes, I got \$75 for the haul.

“Q. And you brought the pipe to Lake County?

“A. That's right.

“Q. And you left the trailer there?

“A. That's right.

“Q. With the pipe on it?

“A. No, the pipe had been taken off.

“Q. Well, what was your destination at the time of the accident?

“A. I was on my way back to San Francisco.

“Q. Did you intend to come back to get the trailer? A. I did.

“Q. You eventually did go back to get the trailer? A. I did.

“Q. And when did you do that?

“A. About five days later.

“Q. Was anybody travelling with you? [173]

“A. No, the second trip, no.

“Q. At the time of the accident?

“A. At the time of the accident, my wife was with me.

“Q. What is her name?”

And I think that should be June Warner.

“Q. Is she in Court? A. No.

“Q. Where does she live?

“A. Number 10 Ord Street.”

Mr. Cathcart: “Ord Court”, I have here.

Mr. Gray: I am sorry. “Ord Court.”

Mr. Gray: (Reading.)

“Q. Your wife had been with you since the time you started? A. No.

“Q. Did you take her with you?

“A. She had been up there on vacation.

“Q. She was in Lake County?

“A. That’s right.

“Q. Let’s see if we can get the facts right. Your wife was at Blue Lake, Lake County, and you were in San Francisco, is that right?

“A. That’s right.

“Q. And a relative of yours ordered the pipe taken up and you agreed to transport the pipe to Lake County for this [174] relative for a certain sum of money, is that right? A. That’s right.

“Q. You were paid that money?

“A. That’s right.

“Q. That went into the partnership, is that right? A. That’s right.

“Q. Then you took the trailer and the tractor that were hitched together, and a load of pipe, and went to Lake County from San Francisco, is that right? A. Yes, sir. It is.

“Q. And there you disconnected the tractor and left the pipe—you disconnected the trailer from the tractor and left the pipe in Lake County, is that right? A. That’s right.

“Q. At the time of this accident, you were returning to San Francisco? A. That’s right.

“Q. Were you returning back to continue with your business?

“A. No, I had a definite purpose in coming down, I might state. I had a payment due on my insurance policy Monday. My policy would lapse if I did not get in here Monday. That was the reason for coming down to Frisco here.

“Q. So you came down for that business?

“A. That’s right.

“Q. And when did you intend to go back for your trailer? [175] A. The following day.

“Q. For your trailer?

“A. The following day.

“Q. That would have been Tuesday?

“A. Yes.

“Q. What day did this accident occur?

“A. That happened on a Saturday.

“Q. Now going back to our Dodge tractor, that was registered with the Department of Motor Vehicles, wasn’t it? A. It was what?

“Q. It was registered with the Department of Motor Vehicles, like an automobile? A. Yes.

“Q. And that was registered in your name and Mr. Woodrow’s? A. That’s right.”

And then the rest of it is about the accident. I

guess we are not concerned with that, is that correct?

The Court: Yes, all right.

Mr. Cathcart: Excuse me for one moment, before we leave that subject. Would you stipulate that testimony was given on September 15, 1947, at the trial in a state court action under cross-examination by you?

Mr. Gray: Yes, I have stated that.

Mr. Cathcart: And that was after the testimony before [176] Judge Goodman, which was on August 11, 1947?

Mr. Gray: If those are the dates.

Mr. Cathcart: That is my best information.

Mr. Gray: All right.

Further Recross Examination

Mr. Gray: Q. And now Mr. Warner, counsel has interrogated you about a statement that you gave to an adjuster for the insurance company? Where was that statement taken from you?

A. Some place, I believe it was on Pine Street, I am not sure, though.

Q. Well, it was the office of the company, one of the—

A. No, I don't think it was. I think it was, the way I understand it—I am not positive, but I would say the way I understood it, it was the adjuster of a different place. I am not sure about that.

Q. Well anyway, you were directed by the insurance company to see this man? A. Yes.

Q. And to tell him the facts?

A. Yes. That's right.

Q. And when you saw him, he asked you certain questions, did he? A. That's right.

Q. And you gave him certain answers, is that right? [177] A. That's right.

Q. And then he made certain notes, is that right? A. Yes.

Q. And then he had you sign these notes, is that right? A. That's right.

Q. Now in this statement that counsel called your attention to, there is nothing said about pipe hauling or anything. Did this adjuster ask you whether you had hauled anything up to Willow Creek? A. No, I don't believe he did.

Q. Well—

The Court: We are going over this thing unnecessarily. I asked those questions to avoid your having to do so.

Mr. Gray: Well, counsel went into it, is the reason I am.

The Court: Well I know, but he has given the explanation; he has stated that he never mentioned that to anyone, that he wasn't asked the question, that the only time he began thinking and talking about the load was after he talked to somebody.

Mr. Gray: Other haulers.

The Court: Whatever they call them.

The Witness: Operators.

The Court: Operators, yes, who told him that it was important, is that correct? [178]

The Witness: That's correct.

The Court: All right.

Mr. Gray: Well, then, one question on that.

Q. Do I understand it is your testimony that the only reason that you didn't make mention of pipe or hauling anything was because it wasn't asked, is that correct? A. That's right.

The Court: I am sorry, that is not a correct summary. That is not a correct summary of this testimony.

Mr. Gray: Well I mean, as far as this adjuster is concerned.

The Court: Oh yes, that is correct.

Mr. Gray: Yes.

The Witness: Yes, that is correct.

The Court: All right, go ahead.

Mr. Gray: That is all.

The Court: Q. And you didn't mention it to the others because you didn't think it was important? A. No.

Q. In other words, until you began to think that possibly the omission that the fact that you were carrying pipe was important so far as your coverage is concerned, you just talked about the trip, is that correct? A. That's right.

The Court: All right. Any more questions, gentlemen?

Mr. Cathcart: Do you remember making any statement to [179] your insurance company?

A. No.

Q. You don't recall ever having made any written statement, or a written report about this question of coverage?

A. No, I could have. I wouldn't swear to it.

Q. You wouldn't remember what it could have been?

The Court: Well, if you have anything, just show it to him and save time.

Mr. Cathcart: I don't have the original, I just have a copy. I don't know where the original is.

The Court: Well, is the copy in typewriting?

Mr. Cathcart: Yes sir, it is a typewritten copy. It is not signed.

The Court: It is not signed?

Mr. Cathcart: No, it just has an indication of signature.

A. I can recognize my own words.

Mr. Cathcart: Q. I will ask you to read this.

Mr. Cathcart: I am sorry, I do not have a copy.

Mr. Gray: Well counsel, I think you should show it to me.

Mr. Cathcart: I want to see if this gentleman can recognize it.

Mr. Gray: Well, I would like to know what it is about.

Mr. Cathcart: Surely.

Mr. Gray: No date on it, and no signature.

Mr. Cathcart: I just want to ask him.

The Court: Well counsel, I was the one who suggested that he might show it to him. If the witness cannot identify it—

Mr. Gray: Well, if he offers it—

The Court: You may insist on the proper foundation being laid. All he is trying to do is to find out.

(Document handed to witness.)

The Court: I am trying to come to a stopping point, ladies and gentlemen of the jury, and I will give you a recess. Probably we will excuse you for the morning while we go on and attend to other matters.

The Court: Q. Does that read like something you said to them later on after that statement?

A. Certain parts of it I would say are my words, but there are other parts that are not my words.

The Court: Well all right then; that wouldn't be sufficient foundation.

Mr. Gray: No.

Mr. Cathcart: No sir.

The Court: Anything further?

Mr. Cathcart: No sir.

Mr. Gray: That is all.

The Court: All right.

(Witness excused.) [181]

The Court: All right, gentlemen, do you have anything else?

Mr. Gray: Are you finished with Mr. Warner?

Mr. Cathcart: Yes sir.

Mr. Gray: You may be excused.

The Court: All right. Well now, gentlemen, let's have an understanding; does that close the testimony in its entirety?

Mr. Gray: Yes, your Honor.

Mr. Cathcart: Yes sir.

* * * *

[182]

Mr. Cathcart: Well then, I at this time will renew my motion for a directed verdict in favor of defendant, on all of the grounds stated yesterday.

That will be the ruling of the Court. I shall reserve the ruling on the motion for directed verdict until after the verdict, under the provisions of Section 50(b) of the Federal Rules of Civil Procedures.

CERTIFICATE OF REPORTER

I, Eldon N. Rich, Official Reporter, protem, certify that the foregoing 186 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

[Endorsed]: Filed Oct. 5, 1948.

[186]

[Endorsed]: No. 12056. United States Court of Appeals for the Ninth Circuit. George W. Boulter and Margretta L. Boulter, Appellants, vs. Commercial Standard Insurance Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 5, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12056

GEORGE L. BOULTER and MARGRETTA L.
BOULTER,

Plaintiffs and Appellants,
vs.

COMMERCIAL STANDARD INSURANCE
COMPANY, a corporation,
Defendant and Appellee.

STATEMENT OF POINTS UPON WHICH
PLAINTIFFS AND APPELLANTS IN-
TEND TO RELY, AND DESIGNATION OF
PARTS OF RECORD NECESSARY FOR
THE CONSIDERATION THEREOF

Following is a statement of the points upon which plaintiffs and appellants intend to rely on the appeal in this cause:

Plaintiffs and appellants do hereby adopt and incorporate by reference herein a statement of the points upon which they intend to rely on the appeal in this cause which was heretofore filed in the office of the clerk of the court from which this appeal is taken.

Plaintiffs and appellants do hereby adopt and incorporate by reference herein the designation of parts of record necessary for the consideration of the points made in the appeal in this cause which was heretofore filed in the office of the clerk of

the court from which this appeal is taken except that only those parts of the reporter's transcript that are hereinafter set forth are deemed necessary by plaintiffs and appellants for a consideration of this appeal:

Page 2, line 6, to page 9, line 12.

Page 10, lines 8 to 25.

Page 28, line 15, to page 65, line 15.

Page 115, line 23, to page 140, line 23.

/s/ NATHAN G. GRAY,
Attorney for Plaintiffs and Appellants, George W.
Boulter and Margretta L. Boulter.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Oct. 5, 1948. Paul P. O'Brien,
Clerk.

